No. 155.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1923.

STATE OF MISSOURI ON THE RELATION OF JESSE W. BARRETT, ATTORNEY-GENERAL, PUBLIC SERVICE COMMISSION OF MISSOURI, AND KANSAS CITY GAS COMPANY, APPELLANTS,

VS.

KANSAS NATURAL GAS COMPANY, APPELLEE.

Filed November 20, 1922.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DIVISION OF THE WESTERN DISTRICT OF MISSOURI.
ARBA S. VAN VALKENBURGH, JUDGE.

BRIEF FOR APPELLEE.

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Bartlesville, Okla.,
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Bartlesville, Okla.,
RICHARD J. HIGGINS,
Kansas City, Kas.,
Solicitors for Kansas Natural Gas Company, Appellee.

SUBJECT INDEX.

CASES AND AUTHORITIES.

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BRIEF AND ARGUMENT OF APPELLEE.

STATEMENT OF CASE.

This is an appeal by (a) State of Missouri on the relation of Jesse W. Barrett, Attorney-General, and (b)

the Public Service Commission of Missouri, (complainants below) and (c) Kansas City Gas Company, (intervener below) from a final decree entered by the District Court of the United States for the Western Division of the Western District of Missouri, dismissing: (1) the bill of complaint filed by the complainants below against the Kansas Natural Gas Company, and (2) the intervening bill of Kansas City Gas Company. (Trans. 26-27.)

For brevity, State of Missouri is hereinafter referred to as "State;" Public Service Commission of Missouri is hereinafter referred to as "Commission;" Kansas City Gas Company is hereinafter referred to as "Kansas City Company;" and Kansas Natural Gas Company is hereinafter referred to as "Kansas Natural." The Public Service Commission Act of the State of Missouri is hereinafter referred to as the "Act."

Briefly stated, this is a case in which State and Commission as complainants in the court below sought an injunction to prevent Kansas Natural as defendant from increasing its rates for natural gas sold by Kansas Natural to various supply or distributing companies in the State of Missouri, unless and until the Kansas Natural had complied with the provisions of the Act. "This action is maintained for the purpose of requiring supply company (Kansas Natural) to file its rates with the Commission as provided by law." (Appellants' brief, 63.) This action was brought upon the theory, as stated in the bill, that Kansas Natural is a "gas corporation within the meaning of the Act," (Trans. 4),

and therefore subject to regulation thereunder as to rates charged by it. Kansas Natural in its answer denied that it was a "gas corporation within the meaning of the Act," (Trans. 11) and further averred that its business, to-wit: the transportation of gas from Oklahoma and Kansas to various points in Missouri where such gas was sold to distributing companies, was interstate commerce, and therefore such business was free from regulation as to rates by the State.

Kansas City Company intervened, and in its bill alleged that it purchases and receives gas from Kansas Natural at Kansas City, where it distributes such gas in accordance with the obligations of a franchise from the City of Kansas City. It adopted the allegations of the bill of complaint, and sought an injunction to restrain Kansas Natural from increasing the rates to it for the alleged reason that Kansas Natural was a "gas corporation within the meaning of the Act," and therefore Kansas Natural could only increase its rates in accordance with the provisions of the Act.

The statement of case as made by appellants in a general way fairly informs the Court as to the pleadings and evidence. A more detailed reference to certain portions of the pleadings and certain portions of the evidence will be made in our discussion of the legal propositions.

Upon final hearing, the court below ruled the case in favor of the defendant Kansas Natural, and refused the injunction prayed for and dismissed the bill of complaint and intervening bill of complaint.

The propositions in this case are:

First: Is Kansas Natural a "gas corporation" within the meaning of the Act? In the determination of this proposition, there are presented three inquiries:

(a) Is Kansas Natural operating a "gas plant" within the meaning of the Act?

(b) Is Kansas Natural operating a "gas plant" for "public use" within the meaning of the Act?

(c) Is Kansas Natural operating a "gas plant" for "public use" pursuant to any privilege, license or franchise granted by the State of Missouri, or any political subdivision, county or municipality thereof, within the meaning of the Act?

Second: Is Kansas Natural (which is conceded by the pleadings to be engaged in interstate commerce) subject to regulation by the State and the Commission with respect to rates to be charged by it to distributing companies?

Appellee contends that all of the questions must be answered in the negative.

BRIEF OF ARGUMENT OF APPELLEE.

Kansas Natural is not a "gas corporation" operating a "gas plant" within the meaning of the Act, for the reason that it is not operating for "public use" nor distributing or selling gas for "light, heat or power."

The bill avers (Trans. 4) and the answer denies (Trans. 11) that Kansas Natural is a "gas corporation within the meaning of the Act." A "gas corporation within the meaning of the Act," is any corporation owning. operating or controlling any property used for or in connection with the distribution or furnishing of gas for light, heat or power, operating for public use, under privileges, licenses or franchises granted by the State or any political subdivision, county or municipality thereof. (Subdivisions 10 and 11, Section 10411, Revised Statutes Missouri 1919, see page .... ante).

Kansas Natural owns property in Missouri that it uses in connection with completing the transportation of natural gas from Kansas and Oklahoma (Trans. 39-40). The situation connected with the delivery of gas by the Kansas Natural is dealt with in the evidence only with respect to the delivery at Kansas City, Missouri, (Trans. 39-40) but in the case of the distributing companies at other cities, the situation is substantially the same. Kansas Natural does not furnish or distribute gas to its customer, the Kansas City Company for use by such customer for "light,

heat or power"; but from evidence introduced by complainants and intervenor, it appears that *"gas is furnished and delivered to meet the requirements of the Kansas City Company as governed by the requirements of its consumers from time to time."* (Trans. 40.) By the franchise it is made the duty of Kansas City Company to distribute, sell and supply gas for private and public use in Kansas City, (Trans. 50), and for "illuminating, heating and mechanical purposes" (Trans. 55.)

The Act creates a public service commission. The Act defines with very elaborate particularity the various lines of business that come within the jurisdiction of the Commission, and with equal particularity the powers of the Commission with respect thereto. (Ante. p .... to .....)

In the bill, the State and the Commission have laid the foundation of the Commission's jurisdiction solely upon the claim that Kansas Natural is a "gas corporation within the meaning of the Act." (Trans. 4.) The answer denies that Kansas Natural is a "gas corporation within the meaning of the Act." (Trans. 11.) The term "gas corporation" is defined in the Act. (Subdivision 10 and 11 R. S. Mo. 1919, section 10411). Of course, under such a state of the record, unless it appears from the evidence that Kansas Natural is a "gas corporation within the meaning of the Act," (there being no other basis for the assertion of jurisdiction on the part of the Commission) the bill of complaint must, necessarily, be dismissed.

In order that a concern be a "gas corporation" it must operate a "gas plant"; it is true that the bill of complaint avers that Kansas Natural owns and operates a "natural gas plant and pipe line system" and the answer admits that the Kansas Natural operates a "natural gas plant and pipe line system," but the complaint did not aver, nor did the answer admit that the Kansas Natural owns and operates a "gas plant within the meaning of the Act." In connection with the allegation that Kansas Natural is a "gas corporation," it is averred that Kansas Natural is a "gas corporation within the meaning of the Act." This last averment was denied. Of course, Kansas Natural in a certain sense is operating a "gas plant"; it owns and uses pipes for the transportation of gas and sells and delivers gas to distributing companies, but we contend that the pleadings should be construed with reference to the allegation that Kansas Natural is operating a "gas plant," so as to admit of inquiry as to the character of gas plant that Kansas Natural is operating, and if it appears from the evidence that Kansas Natural is not operating a "gas plant within the meaning of the Act," then such conclusion should be drawn by the court, and full effect given thereto. A "gas plant" is defined by the "Act" as property used in connection with the distribution of gas (natural or manufactured) for light, heat or power. The evidence introduced by complainants and intervenor conclusively established that Kansas Natural is not distributing or furnishing gas for "light, heat or power," to any consumer that is affected by the increase in

rates announced by the Kansas Natural: (Trans. 9-39-40) that the distributing companies which are affected by the increase in rates are not using gas for light, heat or power, nor in fact, are they consumers of such gas for any purpose but such gas is purchased by them to meet the requirements of their customers, who are consumers. (See paragraph 12 of Stipulation, Trans. 40.) Therefore, it necessarily follows that the "gas plant" of Kansas Natural is not such a "gas plant" as is described in the "Act" for the reason that it is not used for the distribution of gas for light, heat or power.

It seems apparent that the Legislature of Missouri in defining the term "gas plant" intended to include within the definition only such "plants" as were used for the distribution of gas to "consumers." Natural gas is produced from wells, and in many cases these wells are owned by others than those distributing the gas therein produced to users or consumers. This the legislature knew, because natural gas was used in Missouri long before the passage of the "Act." In connection with all gas wells, the owner must maintain some pipes and connections at the well in order to deliver the gas to a customer, whether such customer be a consumer of the product or a merchant therein. It was intended by the "Act"—it is the underlying scheme of the "Act"—that transactions of individuals or corporations owning property used in the distribution of gas with those who are using gas for "light, heat or power" (in other words, consumers

of the product and not mere merchants in or distributors of gas) should be subject to Commission control. It clearly was not intended by the "Act" to go back of the person or corporation bound by a public obligation to furnish to the public gas for heat, light and power (i. e. a public utility) and regulate persons or corporations dealing with such public utility only as a supplier of natural gas to be used by the public utility in furnishing service to the public. If Kansas Natural which supplies gas to the Kansas City Company (a public utility and non-consumer—a merchant in gas) is subject to regulation because the Kansas City Company uses the gas purchased from Kansas Natural for the purpose of sale to the public for light, heat or power, then the owner of the gas well which furnished gas to the Kansas Natural is likewise subject to Commission regulation. It would seem to necessarily follow that the owner of the land upon which is located the gas well would also be subject to regulation as a public utility. This would be so, because the owner of the land upon which is located the gas well from which gas is sold to the Kansas Natural, is dealing with a product that is finally served to the public by others, but through agencies (of which he is one) in a direct sequence through him. If the State may control any one of these agencies, other than the one under the public obligation, then the State may control all. The theory of public utility regulation has never been carried that far, and if attempted, would give rise to serious constitutional questions. But even admitting that such character of regulation be

constitutionally sound, such theory could not be sustained in this case, because there is an absence of legislation to justify the theory.

In order to be a "gas corporation" within the meaning of the Act, there must be a "gas plant within the meaning of the Act," operated for "public use" under a privilege, license or franchise granted by the State, or some political subdivision or municipality thereof.

Kansas Natural is not operating its property for "public use." Its sales are to but one customer in each community. This customer is not a consumer, but a merchant in the product sold. The cases hereinafter cited and the quotations therefrom apply to two of the propositions presented in this case, to-wit: (1) Kansas Natural is not operating a "gas plant within the meaning of the Act." and (2) Kansas Natural is not operating its property for "public use."

In the case of *Nowata County Gas Co.* v. *Henry Oil Company*, 269 Fed. 742, the Circuit Court of Appeals for the Eighth Circuit held that a corporation furnishing gas to a public service corporation which in turn publicly distributed such gas in Nowata, Okla., was not subject to regulation by the Oklahoma commission. The court in its opinion says:

> *"Our attention has not been called to any decision by a court which holds that under the police power the state may create an administrative body or commission with authority to fix or establish prices to be paid by a public utility for things purchased and used by it or, as in this case*

for a commodity furnished by it to the public. (Italics ours.)

"It is unnecessary to consider the question above suggested, as the law of the State of Oklahoma conferring jurisdiction on the Corporation Commission over public utilities does not attempt to confer such authority. The statute (Sec. 2, Chapter 93, Session Laws, 1913) reads as follows:

> " 'The Commission shall have general supervision over all public utilities with power to fix and establish rates and to prescribe rules, requirements and regulations affecting their services, operation and the management and conduct of their business.'

"Taken in connection with other provisions of the statute creating the commission and defining its powers, it seems clear that the legislature conferred, and only intended to confer authority to fix the rates to be charged by a public utility and to be paid by its patrons for the thing furnished or the services rendered by it to the public. (Italics ours.)

"The order of the commission fixing, or attempting to fix, the price to be paid by the plaintiff for gas thereafter to be supplied by the defendant to the plaintiff, and by it furnished to the public, cannot be upheld on the ground that the plaintiff was a public service corporation or public utility. If the order of the commission cannot be sustained upon some other ground, it is null and void and constitutes no defense to the suit of the plaintiff for damages for breach of the contract. (Italics ours.)

"The commission had authority to fix the rates to be paid by the plaintiff for gas furnished it by the defendant, notwithstanding the contract, if the defendant, the Henry Oil Company, in supplying gas to the plaintiff was acting in the capac-

ity of, or exercising the functions of, a public utility. The expression 'public utility' characterizes the business, rather than the owner of the business, and in order that a business shall be a public utility it must in some way be impressed with a public interest. One of the earliest and the leading case upon the subject is *Munn* v. *Illinois, supra,* in which it is said:

> " 'Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control.'

"In *Pinny & Boile Company* v. *Los Angeles, G. & E. Corporation, supra,* (168 Cal. 12, 141 Pac. 620, L. R. A. 1915-C 282, Ann. Cas. 1915-D, 471) it is said:

> " 'It is the duty which the purveyor or producer has undertaken to perform on behalf of and so owes to the public generally, or to any defined portion of it, as the purveyor of a commodity, or as an agency in the performance of a service, which stamps the purveyor or the agency as being a public service utility.'

"In *State ex rel. M. O. Danciger & Co.* v. *Pub. Ser. Com. of Mo.,* 275 Mo. 496, 205 S. W. loc. cit. 40, the Supreme Court of the State of Missouri in discussing this question said:

> " 'State regulation of private property can be had only pursuant to the police power, which power is bottomed on and wholly de-

> pendent upon the devotion of private property to a public use. If the requirement that the private property shall be devoted to a public use, before it can be regulated, and before inquisitorial authority be exercised over it, is not to be read into the applicatory law, then that law is obviously unconstitutional, because it takes private property for public use without compensation.'

"From the evidence it appears that the defendant is a corporation organized under the laws of South Dakota. It held leasehold interests in numerous parcels of land situated in the gas field above mentioned. In the development of these lands for natural gas it drilled altogether 45 wells. Between 1906 and 1916 it produced and disposed of large quantities of natural gas to seven customers, of which the plaintiff was one. The plaintiff, as already stated, was a public service corporation supplying gas to the people of the city of Nowata. The other customers of the defendant were industrial concerns, some of them perhaps public utilities, located at Bartlesville, a few miles west of the gas field. All of the gas produced by the defendant was disposed of by it to all of its customers, except one, at its wells in the gas field. The gas furnished by the defendant to one of its customers was delivered at Bartlesville through a pipe line owned and operated by another company, known as the Henry Gas Company. The fact that this pipe line was not owned or operated by the defendant company is of no great importance. It does not appear from the record that in the construction of the pipe line the owner exercised, or attempted to exercise, the right of eminent domain, or that it has any franchise in respect to said pipe line from the city of Bartlesville or other public municipality.

> "During a large part of the time that the defendant was delivering gas to the plaintiff at the rate of 2 cents per 1,000 cubic feet, it was delivering gas to its other customers at rates ranging from 2½ cents to 5 cents per 1,000 cubic feet. Applying the principles of law announced in the foregoing cases to the facts in this case, we do not think the business in which the defendant was engaged constituted it a public utility, or that it is a public utility under the Constitution and acts of the Legislature of the State of Oklahoma creating and defining public service corporations or public utilities."

The Supreme Court of Missouri in the case of *State* v. *Public Service Commission*, 275 Mo. 496, 205 S. W. 36, (cited *supra* p. ....) had occasion to construed and apply certain provisions of Section 10411, Revised Statutes of Missouri, 1919, which are very similar to the provisions of the same section which are under consideration in this case. The question presented in the case of *State* v. *Commission*, *supra*, was, has the Commission the power to regulate, as a public utility, a brewery corporation supplying electric energy within a three-block radius from the brewery when such brewery was operating in so furnishing such energy without a franchise? The regulation, of course, sought to be imposed dealt only with the sale of electrical energy. Following the definition of "gas plant" and "gas corporation" in Section 10411, Revised Statutes of Missouri, 1919, are found definitions of the terms "electric plant" and "electric corporation." The statutory definition of "electric plant" and "electric cor-

poration" omit all reference to "public use" of the plant. Notwithstanding such omission, the Supreme Court of Missouri held the words would be understood as being in the statute, and that an electric plant in order to be subject to regulation must be operated for "public use." The court in its opinion said there was in the case no explicit professing of public service or undertaking to furnish lights or power to the whole public, or even to all persons within the limited area of three blocks. The court pointed out that if the electric department of the brewery plant was a public utility, then under the provisions of the Act, the Commission could compel service to all residences and business houses, and for all purposes, at least within the limited area furnished. Also (there being absent the question of franchise) the Commission could require service to the entire town of Weston. In order however, to do either of these things, a franchise must be obtained but the Supreme Court in its opinion pointed out that it had expressly held in a similar case that any order which required a utility to obtain a franchise was beyond the power of the Commission. (*State ex. rel* v. *Commission*, 270 Mo. loc. cit. 442, 192 S. W. 958, 198 S. W. 872). Continuing, the Supreme Court said:

> "In the light of these considerations, does the business of respondent constitute him a public utility within the meaning of the Public Service Commission Act? We are of opinion that it does not; for, as forecast above, state regulation of private property can be had only pursuant to the police power, which power is botttomed on and wholly

dependent upon the devotion of private property to a public use. If the requirement that the private property shall be devoted to a public use, before it can be regulated and before inquisitorial authority be exercised over it, is not to be read into the applicatory law, then the law is obviously unconstitutional, because it takes private property for public use without compensation."

What was said by the Supreme Court of Missouri in the above case, is, of course, fully and completely applicable to and decisive of the case at bar. Kansas Natural has no franchise, yet, if it is subject to Commission control, it may be required under the Act to furnish gas to the public generally. And, yet, this it cannot be required to do, because it would necessarily be required to obtain the consent of the city in order to use the city streets, and this neither the courts nor the Commission can compel. *State* v. *Commission*, 270 Mo., loc. cit. 442. The considerations which led the Supreme Court of Missouri to conclude that the electric business of the brewery was not subject to regulation under the "Act," are all present in the case at bar. There is the same absence of franchise and public profession. But in one particular, the case at bar is even stronger as against control. Kansas Natural does not distribute gas to consumers, which the electric plant did.

The Supreme Court of Missouri in the case of *State* v. *Commission*, 275 Mo. 496, *supra*, also said:

> *"The rule by which profession of public employment is to be tested, where, as here, such profession arises if at all implicitly, is thus laid down by Mr. Wyman:* (Italics ours.)

"The fundamental characteristic of a public calling is indiscriminate dealing with the general public. As Baron Alderson said in the leading case: 'Everybody who undertakes to carry for any one who asks him is a common carrier. The criterion is whether he carries for particular persons only, or whether he carries for everyone. If a man holds himself out to do it for every one who asks him, he is a common carrier, but if he does not do it for everyone, but carries for you and me only, that is a matter of special contract.' This regular course of public service without respect of persons makes out a plain case of public profession by reason of the inevitable inference which the general public will put upon it. 'One transporting goods from place to place for hire, for such as see fit to employ him, whether usually or occasionally, whether as a principal or an incidental occupation, is a common carrier.' 1 Wyman on Pub. Service Corps., *227*." (Italics ours.)

Clearly under the above decision, Kansas Natural is not engaged in a public employment. Its business is with but one customer in each community. It does not deal with all. It does not appear that it has the facilities to deal with the public, and it does appear that it is without authority to deal with the public in this: That it is without a franchise to distribute gas to the public. Kansas Natural deals with only such distributing companies as it elects to deal with. Throughout all of Western Missouri, where there is located many towns of substantial size, it deals with gas distributing companies in but the few places mentioned in the bill. It could not be required to extend its service to distributing companies in other cities. Its relations with distributing

companies are contractual and private, and do not arise out of the exercise of public relations or profession.

Another very interesting feature of the foregoing case (275 Mo. 496) is the reference therein to the case of *State ex rel.* v. *Spokane, etc., Railroad Co.*, 89 Wash. 599, 140 Pac. 591. With respect to the Washington case, the Supreme Court of Missouri said:

> "The case of *State ex rel* v. *Spokane, etc. Railroad Co., supra*, which was decided by the Supreme Court of Washington, is practically on all fours with the case at bar upon the ultimate facts. Not only is this true, but the definitions in our own Public Service Commission Act (and largely the act itself) were obviously taken, with mere slight verbal changes, from the prior Washington enactment on the same subject. Laws Wash. 1911, pp. 538-612."

In the case of *State ex rel* v. *Spokane Railroad Company, supra*, the Washington Commission instituted mandamus to compel the defendant railroad company to disclose and file with the Commission its contracts for the sale of electric energy to various customers. The defendant was a street railroad company. It was producing and purchasing more than sufficient electrical energy to take care of its street railway business. By contract, the street railway company had sold its surplus current to various persons, including a land company, one or two farmers who used the power for irrigating purposes, two manufacturing plants, one grain elevator, one irrigation company, *and three or four individual owners of local electric light plants in towns and villages in the vicinity of Spokane*. That defend-

ant with respect to its street railway business was subject to the control of the Commission was not challenged. In fact, the action by the Commission was based upon the claim that the Commission could not make an adequate and intelligent survey of the rates charged for street railway service without having knowledge of the contracts and activities of defendant in connection with the sale of power.

The Supreme Court of Washington in its opinion says that the Act of 1911 assumes jurisdiction over power companies and electric companies, but the court finds nothing that compels the conclusion that the legislature intended to inquire into and regulate such companies, except in so far as their business affects the right of the whole public to the use of their products upon fair or reasonable terms. The court further said:

> "Granting for the sake of argument that the right of the legislature to exercise the police power to the extent of regulating and controlling the price to be charged for power sold to private individuals or others, such right should not be declared by the courts in the absence of express legislation. The regulation and control of business of a private nature is sustained by reference to the police power, and even then it is sustained only when the courts have been able to say that the business is in character and extent of operation such that it touches the whole people and affects their general welfare. It is upon this principle that *Noble State Bank* v. *Haskell*, 219 U. S. 104, 31 Sup. Ct. 186, 55 L. Ed. 112, 32 L. R. A. (N. S.) 1062, Am. Cas. 1912-A, 487; and *German Alliance Company* v. *Kansas*, 233 U. S. 389,

34 Sup. Ct. 612, 58 L. Ed. 111, L. R. A. 1915-C, 1189, rest.

"*Until the legislature brings a business within the police power by clear intent, courts will not do so. Courts have assumed to say whether an act of the legislature falls within the police power but primarily, the assertion of police power is for the legislature.* They are not disposed to hold that a thing should be done by an individual or by the whole public. They have acted only after the legislature has defined the object of the power. In other words, the courts have never said primarily that the police power should be applied in any given case. Their only inquiry has been whether the legislative act has been reasonably within the legislative power, and the thing sought to be done is fairly within the terms of the act. And it is well that this is so, for the legislative body can extend the demand of police power with sufficient rapidity. There is no reason why the court should engage in a rivalry with it. (Italics ours.)

* * * *

"At the time the act of 1911 was passed, the law was well defined and certain in its terms. *The sale of power to individuals or companies to be in turn sold was not a public use.* The rule and the cases declaring it must have been well-understood by the legislature. Yet, the act no where attempts to cover any use theretofore deemed to be private. Its whole context seems to compel the thought that it had in mind only such use as the public might compel." (Italics ours.)

The court, therefore, concluded (notwithstanding the fact that the street railroad company was clearly subject to the control of the Commission in its ordinary street railway activities) that it was not subject to con-

trol with respect to its contracts for the sale of electrical energy, even though among such contracts were three or four with electric light plants in towns and villages. This conclusion necessarily followed, because "the sale of power to individuals or companies to be in turn sold is not a sale for a public use," and defendant had not assumed the duty of (either by franchise or conduct) to furnish energy to the public.

In our judgment, the Washington case can in no sense be distinguished from the case at bar. It is true that in the Washington case the electrical energy sold was energy not then needed for the operation of the street railway; but the private as distinguished from the public character of the business is the principle that controlled the court's decision. That is to say, the business being done by the street railway company with respect to the sale of power to individuals and to public utilities companies who used the power for sale to the public, was held to be not a sale for public use.

It is not averred in the bill that because of the sale of gas to a few main-line consumers or to consumers in the Joplin, Missouri, mining district, that all of the business of Kansas Natural (including its sales to distributing companies) is thereby subject to regulation by the Commission. No doubt, complainants had in mind at the time they prepared their bill the provisions of subdivision 13 of Section 10478, Revised Statutes Missouri, 1919, (*supra* . . . .), in which it is expressly provided that in case any gas corporation is engaged in other business, that is not subject to the jurisdiction of the

Commission, and its business is so conducted that the two parts thereof are substantially kept separate and apart, such gas corporation shall not be subject to any of the regulations provided by the Act with respect to such other business. The above subsection also disposes of any contention that might be made that because the charter of Kansas Natural might be construed to be broad enough to authorize such company to engage in the public distribution of gas, it is therefore, subject to regulation, regardless of its exercising its full charter powers.

Kansas Natural is not a "gas corporation" operating a "gas plant" for the reason that it is not operating under any privilege, license or franchise granted by the State of Missouri or by any political subdivision, county or municipality thereof.

It will be noted from the statutory definition of the terms "gas plant" and "gas corporation" Subdivision 10 and 11 Section 10411 Revised Statutes Missouri 1919, *supra* .... that a business in order to be subject to regulation by the Missouri Public Service Commission as a "gas corporation" must be one wherein there is a "gas plant" used in connection with the distribution, sale or furnishing of gas for light, heat or power; that it must be operated for public use, and under a privilege, license or franchise granted by the State or some political subdivision, county or municipality thereof.

We have hereinbefore argued the propositions: (1) Kansas Natural is not with respect to the business complained of, distributing gas for light, heat or power;

and (2) Kansas Natural is not with respect to the business complained of operating for public use.

But we contend that it also appears that Kansas Natural is not operating under a privilege, license or franchise granted by the State or by any political subdivision, county or municipality thereof. The words "privilege, license and franchise" often have of course very broad meanings but in view of the context, it seems no great difficulty should be found in determining the meaning intended in this particular case. Section 8390, R. S. Mo., 1919, defines the term "franchise" as used in the article dealing with municipal corporations, as including "every special privilege in the streets, highways and public places in the city, whether granted by the state or the city, which does not belong to the citizens generally by common right." This, we think, is the definition of the term as it was intended in the "act." The word "license" was intended to be used synonymously with the word "franchise." In other words, it comprehends a license to use the "public streets." It is contended by complainants and intervenor that "privilege" is a somewhat broader term, and includes every right including, eminent domain, granted by law to a corporation. This construction, however, we deny. The words "privilege, license and franchise" are used in a "public utility act." The terms, "privilege, license and franchise" are intended to include the "privileges, licenses and franchises" that public utilities, as such, ordinarily or commonly enjoy from state or municipal authority in order that they may conduct the lo-

cal business of a public utility. The existence of a franchise or license is a question of fact. The existence of a privilege (if privilege includes eminent domain) is a question of law. There is in the record an entire absence of evidence tending to establish that Kansas Natural is the possessor of a franchise, license or privilege granted by the State of Missouri or by any city or county in the State of Missouri, or by any political subdivision thereof. There is in the record evidence offered by State and Commission to the effect that Kansas Natural does not have from Kansas City, Missouri, any franchise to use the public streets of said city.

It was averred in the bill that Kansas Natural through its predecessors became obligated to the various cities in Missouri by virtue of the so-called supply contracts with local distributing companies. All of said contracts were, on December 24, 1920, decreed to be no longer of any binding force or effect, and complainants and intervener enjoined from enforcing the same. (Trans. 73.)

It was also averred in the bill that the predecessors of Kansas Natural had entered into an arrangement with Kansas City, Missouri, as provided in Section 20 of the Kansas City, Missouri, franchise. (Trans. 4-5.)

Section 20 of the Kansas City, Missouri, franchise required the predecessors of the Kansas City Company to procure an agreement from the predecessors of Kansas Natural and file the same with the City Clerk of Kansas City, Missouri, under the terms of which agreement the predecessors of Kansas Natural would agree

that if the City of Kansas City, Missouri, should acquire the plant of the Kansas City Gas Company, the predecessors of Kansas Natural would, upon demand, carry out the supply contracts between the predecessors of the Kansas City Company and the predecessors of the Kansas Natural. Kansas City has not acquired the property of the Kansas City Company, so the contract or agreement is not operative; but it also appears from the evidence that the supply contracts between the predecessors of the Kansas City Company and the predecessors of Kansas Natural were by order of the United States District Court, entered on December 24, 1920, held to be no longer operative or binding upon Kansas Natural; and by the said order of December 24, 1920, the Attorney-General of Missouri, the Public Service Commission of Missouri, and the Kansas City Gas Company "were permanently enjoined from enforcing the said supply contracts or rates fixed or referred to therein against plaintiffs or the Kansas Natural Gas Company, and its successors and assigns." (Trans. 80.) Furthermore, it appears from the same order that "the City of Kansas City, Missouri, having in open court expressly disclaimed any intent of enforcing or attempting to enforce the supply contracts or either of them relating to Kansas City, Missouri, no injunction will run against said city in respect to said contracts." (Trans. 80.)

Appellant, the Kansas City Company, by its intervening bill avers that Kansas Natural has been vested by law with the power of eminent domain. Even assuming that Kansas Natural is vested with the power

of eminent domain, one certainly must pause before agreeing with the contention of appellants that thereby Kansas Natural is subject to regulation by the State with respect to the rates that Kansas Natural may charge for the transportation of gas in interstate commerce.

A state may regulate any purely local business that is conducted in accordance with a grant from the State. In the Jamestown case, for example, the power to regulate the rates of the gas company was sustained because the gas company was engaged in operating under a franchise granted by the State authority; but it indeed would be revolutionary if it could be successfully contended that an interstate transportation company was subject to local regulation as to rates for interstate transportation because the state had granted the right of eminent domain to such transportation company.

In all of the States, and with respect to many branches of interstate transportation to some extent at least, the power of eminent domain is granted to companies. Oklahoma sought to restrain interstate commerce by denying to gas companies the right to exercise the power of eminent domain when the proposed transportation in gas was interstate rather than intrastate. This court in the case of *West* v. *Kansas Natural, ante*, declared that such control of interstate commerce was an attempt to exercise authority in excess of that authorized by the Constitution of the United States.

Clearly, the incident that Kansas Natural might be empowered to exercise the power of eminent domain under the laws of Missouri (if it be so empowered) could not vest the state of Missouri with the power to directly regulate interstate transportation conducted by Kansas Natural by fixing and prescribing the rates to be charged for such transportation. Under such a principle every interstate railroad company would be subject to State regulation as to rates. There is no such direct connection between the granting of the power of eminent domain and the fixing of rates for transportation that it could be said that the exercise of the power necessarily involved the right of the State to control the rates. Furthermore, Kansas Natural has never exercised the power of eminent domain. The bill avers such exercise (Trans 18), but the answer denied it (Trans. 23), and there is no proof bearing upon the point. But there is another and very serious question presented in this case with respect to the power of eminent domain. We contend that Kansas Natural is not empowered under the laws of Missouri, nor can it be empowered under the Constitution of Missouri, with the right to exercise the power of eminent domain. Sections 20 and 21 of Article II of the Constitution of Missouri provide as follows:

> "Private property not to be taken for private use—exceptions—public use a judicial question. That no private property can be taken for private use, with or without compensation, unless by the consent of the owner, except for private ways of necessity, and except for drains and ditches

> across the land of others for agricultural and sanitary purposes, in such manner as may be prescribed by law; and that whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public, shall be a judicial question, and as such judicially determined, without regard to any legislative assertion that the use is public."
>
> "Private property for public use—compensation—That private property shall not be taken or damaged for public use without just compensation. Such compensation shall be ascertained by a jury or board of commissioners of not less than three freeholders, in such manner as may be prescribed by law; and until the same shall be paid to the owner, or into court for the owner, the property shall not be disturbed or the proprietary rights of the owner therein divested. The fee of land taken for railroad tracts without consent of the owner thereof shall remain in such owner, subject to the use for which it is taken."

From the foregoing sections of the Constitution, it is established that property may be taken by eminent domain only for public use. We think it has been satisfactorily established herein that the business being transacted by Kansas Natural is not a business that is operated for public use, and therefore the Constitution of Missouri constitutes a very effective barrier against the exercise of the power of eminent domain by Kansas Natural.

But, there is one other question that is likewise presented in this case with respect to this particular matter, and that is the statutory power of Kansas Natural to exercise eminent domain.

The only section of the Missouri statutes that is applicable to corporations such as Kansas Natural, dealing with the subject of condemnation is Section 1791, Revised Statutes of Missouri, as amended by the laws of Missouri, 1921, page 128, which section, in so far as it is applicable, is as follows:

> "In case land or other property is sought to be appropriated by any road, railroad, telephone, telegraph or any electric corporation organized for the manufacturing or transmission of electric current for light, heat or power, or any oil, pipe line or gas corporation engaged in the business of transporting or carrying oil or gas by means of pipes or pipe lines laid underneath the surface of the ground, or other corporation, created under the laws of this State for public use, and such corporation and the owners cannot agree upon the proper compensation to be paid * * * such corporation may apply to the Circuit Court of the county in this State in which such land or any part thereof lies or the judge thereof in vacation by petition, setting forth the general directions in which it is desired to construct their * * * pipe line or gas line, over or underneath the surface of such lands * * * praying the appointment of three disinterested freeholders as commissioners, or a jury to assess the damages which such owners may severally sustain in consequence of the establishment, erection and maintenance of such pipe lines or gas lines, over and underneath the surface of such lands; to which petition the owners of any or all as plaintiff may elect * * * may be made parties. * * *."

It will be noted that Section 1791 by its express terms, extends the right of eminent domain only to corporations created for public use, and it seems to us

from a careful consideration of the statute and such decisions as are applicable thereto that it is the intention of the Missouri Legislature to limit the power of condemnation to domestic corporations. Kansas Natural is a corporation created under the laws of Delaware (Trans. 3) and therefore, the statute would not be applicable to it.

Section 1791 is first found in the laws of Missouri as Section 1——, Chapter 66, Revised Statutes of Missouri 1865. At that time, telephone companies, gas companies, and oil companies were apparently unknown to the law, and for that reason, the power of eminent domain was limited to a much smaller class of corporations than that now included in the law. The original enactment read, in so far as here applicable, as follows:

Revised Statutes of Missouri 1865:

> "In case lands sought to be appropriated by any road, railroad or telegraph corporation created under the laws of this state belong to private persons, and such corporation and the owners cannot agree upon the proper compensation to be paid. * * *."

In the Revised Statutes of Missouri, 1879, the foregoing Act is found as section 892. The changes apparently were made by the revisors. The law was changed by including the words "or other property" after the words "land" and by including the word "telephone" before "telegraph," so that the act reads:

> "In case lands or other property are sought to be appropriated by any road, railroad, telephone, telegraph or other corporation created under the laws of this state for public use, and such corporation and the owners cannot agree upon the proper compensation to be paid, etc."

The above statute remained in the above form until 1915, when it was amended by the laws of Missouri, 1915, page 227, by inserting after the word "telegraph," the following words: "or any electrical corporation organized for the manufacture or transmission of electric current for light, heat or power." The amendatory act also changed the word "lands" as it occurred in the Revised Statutes of 1879 to "land," so that after the amendment in 1915, the act read:

> "In case land or other property is sought to be appropriated by any road, railroad, telephone, telegraph or any electric corporation organized for the manufacture or transmission of electric current for light, heat or power, or other corporation created under the laws of this state for public use, etc."

In 1919 the act was again amended by the laws of Missouri, 1919, page 207, by inserting after the word "power," the following words: "or any oil, pipe line or gas corporation engaged in the business of transporting or carrying oil or gas by means of pipes or pipe lines laid underneath the surface of the ground." So that the act when amended by the laws of 1919, reads as hereinbefore quoted as section 1791, Revised Statutes of Missouri, 1919.

The changes in the statutes made from time to time have undoubtedly been made in order that the laws of the State of Missouri might progress in line with the growth of public business. The law has been amended so as to extend the right of eminent domain to corporations created for other public purposes than those originally specified.

As originally written, there could have been no doubt that the statute restricted the right of eminent domain to domestic corporations. In the light of the historical development of the statute itself, it seems that no doubt as to that intent can now be had.

We recognize that the Supreme Court of Missouri in the case of *Gray* v. *Railway Company*, 81 Mo. 126, l. c. 136, held that a foreign railroad corporation might condemn land for railroad purposes, but an examination of that case discloses that the right of a foreign corporation to condemn land was not based upon the powers given by section 1791 but upon other sections of the Missouri laws that deal directly and exclusively with the condemnation of lands for railroad purposes, and it was from these statutes that the Supreme Court of Missouri found authority in foreign corporations to condemn land. The laws of Missouri, 1870, page 90, provide that any railroad company duly incorporated and existing under the laws of an adjoining state of the United States may extend, construct, maintain and operate its railroad into and through this state, and for that purpose shall possess and exercise all of the rights, powers and privileges conferred by the general laws of

this state upon railroad corporations organized thereunder, and shall be subject to all of the duties, liabilities and provisions of the laws of this state, concerning railroad corporations as fully as if incorporated in this state.

We also recognize that in the case of *Southern Company* v. *Stone,* 174 Mo. 1, l. c. 33, the Supreme Court of Missouri held that foreign bridge companies might condemn lands for approaches to bridges, but in the case of a bridge company, the right was also founded upon a special statute which dealt exclusively with the condemnation of lands for bridge purposes. The right to exercise the power did not arise out of section 1791, although the procedure did.

The very fact that at the time of the decision of the cases of *Gray* v. *Railroad Company* and *Southern Company* v. *Stone,* section 1791, Revised Statutes of Missouri, 1919 (in earlier form) was found in the laws of Missouri, and that the Supreme Court in both cases failed to judicially notice and apply the statute, but on the contrary, sought other statutes as authority for the exercise of the power, is very highly persuasive that the court would have denied the existence of the power had it depended upon the general statute.

In *Chestatee Pyrites Company* v. *Cavenders Creek Gold Mining Company,* 119 Ga. 354, 46 S. E. 422, the Supreme Court of Georgia denied to a foreign corporation the right to condemn land under the statutes of Georgia, notwithstanding the fact that such statutes extended the power to "any corporation."

The Supreme Court of Georgia quotes with approval from Thomson on Corporations, Volume VI, paragraph 7932, as follows:

> "The power of a private corporation to acquire private property for a public purpose is a power which comes to it alone through the delegation by the State of its sovereign right of eminent domain. The power cannot, therefore, be exercised by a foreign corporation on a mere principle of comity, because it will never be presumed in the absence of affirmative legislation that the state delegates any part of its sovereignty to a foreign corporation. ' It may be stated with confidence in every case that this power cannot be exercised by a corporation created under the laws of one state or country within the limits of another state or country, without the consent of the legislature of that other state or country affirmatively expressed."

There is no case in the Supreme Court of Missouri that we have been able to find in which a foreign corporation has asserted the right to exercise eminent domain under the provisions of Section 1791. In fact the only cases in which the right of foreign corporations to exercise the power has been brought in question are the railroad and bridge cases, *supra*, and in these cases, it was held that under the particular statutes relating to foreign railroad companies and foreign bridge companies, respectively, the right to exercise the power was given.

The case of *Cape Girardeau and Scott County Macadamized Road Company* v. *Dennis*, 67 Mo. 438, l. c. 441, is very interesting, because of the construction placed upon the Act by the Supreme Court of

Missouri. In the above case, the contention was made that the corporation seeking to exercise the power should be denied the right, because it was created by special act and not by general law. The Supreme Court denied the validity of such objection, saying, in part:

> "Section 1. Chapter 66 of the General Statutes provides that when land sought to be appropriated by any road, railroad or telegraph company created under the laws of this State, belongs to private persons, and such corporation and the owners cannot agree upon the proper compensation to be paid, such corporation may institute proceedings in the circuit court to condemn such lands for the use of the company. *The language of the section is general. It includes all road, railroad and telegraph corporations created under the laws of this state.*" (Italics ours.)

The act referred to *supra* is the act in this case, except only that the act has been enlarged so as to include other corporations.

The sole question presented under this point is one of course of statutory construction. The statute appears to us to be so plain in its limitations as to not admit of controversy. The right to exercise eminent domain is limited to gas corporations created under the laws of Missouri, and the Kansas Natural, being a corporation of Delaware, is without the power, and therefore enjoys no privilege under the laws of Missouri.

We, therefore, conclude: "Kansas Natural is not a gas corporation within the meaning of the Act," because: (1) Kansas Natural is not selling or furnishing gas for light, heat or power; (2) Kansas Natural

is not selling gas for public use; (3) Kansas Natural is not operating its business for public use; (4) Kansas Natural does not exercise or enjoy a franchise, license or privilege from the State of Missouri or any county, city, municipality or other political subdivision thereof. Therefore, neither State nor Commission may require Kansas Natural to comply with the provisions of the Act before increasing its rates for natural gas.

The business of Kansas Natural that is herein sought to be regulated by the State through the Commission is interstate commerce.

Kansas Natural in the transportation of gas from Oklahoma, through Kansas, into Missouri, is engaged in interstate commerce. That the business of Kansas Natural is interstate commerce has been expressly decided by this court. *West* v. *Kansas Natural Gas Co.*, 221 U. S. 229, 55 L. ed. 716, 35 L. R. A. (N. S.) 1193, 31 Sup. Ct. Rep. 564; *Haskell* v. *Kansas Natural Gas Co.*, 224 U. S. 217, 56 L. ed. 738, 32 Sup. Ct. Rep. 442; *Public Utilities Commission* v. *Landon*, 249 U. S. 236, 63 L. ed. 577, P. U. R. 1916-C-834, 39 Sup. Ct. Rep. 268. As a matter of fact, the bill of complaint avers that Kansas Natural is engaged in interest commerce with respect to the very matters that are sought to be controlled. (Trans. 7.) The evidence introduced by complainants establishes that Kansas Natural produces or purchases gas which it then transports from points in the State of Oklahoma and Kansas to points in the States of Kansas and Missouri; that all of said gas is transported to the States of Kansas and

Missouri, where such gas is sold and delivered to local distributing companies in some thirty towns and villages in the States of Kansas and Missouri; that in connection with the delivery of gas at Kansas City to the Kansas City Company, Kansas Natural maintains permanent physical connections within the State of Missouri between its pipe line system and the plant and street main system of the Kansas City Company; that said connections between the Kansas City Company and Kansas Natural are located at or near the state line of Kansas and Missouri; that Kansas Natural, for the purpose of making such connections, has its pipes for a short distance upon the public streets of Kansas City, Missouri, but that Kansas Natural has no franchise granted by Kansas City, Missouri, authorizing it to occupy the streets, alleys or public places upon or along which to lay, maintain or operate its pipe lines; that no advance orders are given by Kansas City Company to Kansas Natural for the shipment of any definite quantity of gas, but gas is furnished and delivered continuously by Kansas Natural, to meet the requirements of the Kansas City Company as governed by the requirements of its consumers from time to time; that no joint-ownership or intercorporate ownership or relation exists between Kansas Natural and Kansas City Company or any other local distributing company.

In view of (1) the prior adjudication, (2) the allegations of the bill, and (3) the evidence introduced in the case, we take it that it is established that Kansas

Natural is engaged in interstate commerce with respect to the particular class of business that is here sought to be regulated.

Kansas Natural is not subject to regulation by the Commission as to the rates to be charged by it to local gas distributing companies in the State of Missouri because the business being conducted by Kansas Natural is inter-state commerce.

Appellants, State and Commission, while averring in their bill that the business of Kansas Natural, to-wit: the transportation of gas from Oklahoma to Missouri is interstate commerce, nevertheless, aver that the Commission may directly regulate such interstate commerce because it is "interstate commerce of a local nature." (Trans. 7.)

There is in so far as the Constitution of the United States is concerned no "interstate commerce of a local nature." To so describe interstate commerce is an attempt to make a distinction not authorized by the supreme law. Interstate commerce as defined by the Constitution is "commerce among the several states," and Congress alone has power to directly regulate such commerce. The Constitution does not provide for two classes of "commerce among the several states." The right given to Congress by the Constitution with respect to commerce among the states is as complete with respect to a movement in commerce of but one mile and from one state to another as it is where the transportation extends over thousands of miles and the route traveled covers many states.

> "If, as was intimated in that case (referring to the case of *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196), interstate commerce means simply commerce between the states, it must apply to all commerce which crosses the state line, regardless of the distance from which it comes, or to which it is bound before or after crossing such state line,—in other words, if it be commerce to send goods from Cincinnati in Ohio to Lexington in Kentucky, it is equally such to send goods or to travel in person from Cincinnati to Covington; and while the reasons that influenced this court to hold in the Wabash case that Illinois could not fix rates between Peoria and New York may not impress the minds so strongly when applied to fixing the rates or toll upon a bridge or ferry, the principle is identically the same." *Covington, etc. Bridge Co.* v. *Kentucky*, 154 U. S. 1. c. 218.

The business of Kansas Natural does not involve merely the transportation of gas from a point outside of the State of Missouri to a point within such State. Its business is much broader and more complex. It includes the production and purchasing and transportation of gas in volume sufficient to meet the requirements of distributing companies in some thirty towns and villages in the States of Missouri and Kansas. (Trans. 40.) The gas is transported partly from Oklahoma and partly from Kansas into and through Kansas and into Missouri. The population of the cities and towns served exceeds one-half million. (Trans. 40.) According to the record, among the cities served are Atchison, Leavenworth, Topeka, Lawrence and Kansas City, all in Kansas, and at the north end of the lines. The various cities in Missouri, including

Kansas City at the north and Joplin at the south; also such cities as Coffeyville, Pittsburg, Columbus and Independence, all in Kansas at the south end of the line. (Trans. 73-81.)

Assuming the principle contended for by complainants to be correct, that is, that in the absence of Federal regulation, a State may directly regulate the rates to be charged for transportation in "interstate commerce of a local nature," one is confronted with the inquiries: What is "interstate commerce of a local nature"? Is Kansas Natural engaged in "local interstate commerce"? We do not know what may be meant by "interstate commerce of a local nature," but if the term is susceptible of definition, it surely could not include transportation over parts of three states and to thirty cities in two of such states. If this is "interstate commerce of a local nature," then under what circumstances is interstate commerce not "local"? In the light of this situation, certain parts of the opinion of trial court are important. The court said, quoting from the case of *Wabash* v. *Illinois*, 118 U. S. 557:

> "'And it would be a very feeble and almost useless provision, but poorly adapted to secure the entire freedom of commerce among the States which was deemed essential to a more perfect union by the framers of the Constitution, if at every stage of the transportation of goods and chattels through the country the state within whose limits a part of this transportation must be done, could impose regulations concerning the price, compensation or taxation, or any other restrictive regulation interfering with and seriously embarrassing this commerce.'

"Those remarks are thought pertinent in the case at bar. This gas originates in Oklahoma, passes through Kansas and comes into Missouri; and, of course, if the principles contended for by complainant be indulged, there might be, could be, and probably would be such regulation in these various states as in a very prohibitive degree to burden, restrict and embarrass the commerce of this Nation." (Trans. 130.)

Evidently appellants, State and Commission, as well as appellant, the Kansas City Company, (because Kansas City Company adopted the allegations of the bill filed by State and Commission) had in mind in making the averment that the business of Kansas Natural is "interstate commerce of a local nature" the decisions of this court which establish the proposition which is so clearly stated by Prentice & Eagan in their work on "The Commerce Clause" at page 28:

"* * * In matters of local nature, such as are auxiliary to commerce, rather than a part of it, the inaction of Congress is to be taken as an indication that for the time being, and until it sees fit to act, they may be regulated by state authority."

The same authors in the same work at page 89, state the same principle in somewhat different form:

"Upon interstate commerce, the states may lay no burden whatever, for that, it is said, amounts to such a regulation of it as belongs to Congress alone; while, on the other hand, it is frequently said that matters that are auxiliary to commerce, or which may be used in aid of commerce, the powers of the state, in the absence of federal action, are unimpaired."

Upon the basis of the principle that the states may lay no burden whatever on interstate commerce, the power to fix or regulate rates for interstate transportation has been denied to the states by this court. The two cases which are perhaps most frequently cited in support of the above principle are the cases of *Wabash Railroad Company* v. *Illinois*, 118 U. S. 557, and the Minnesota Rate Cases, 230 U. S. 332.

Justice Hughes in writing the opinion of this court in the Minnesota Rate cases stated the principles applicable to the regulation of interstate commerce in terms so clear, plain and concise, that no abstract or digest of the principles could be made in less space than that embraced in the opinion itself. It is significant that in this very important decision the learned and able Justice never referred to "interstate commerce of a local nature," or attempted any classification of interstate commerce by any other designation; nor did he assert that with respect to interstate commerce the states under any circumstances had the power of direct regulation. The case relied upon by appellants, *Pennsylvania Gas Co.* v. *Commission*, 252 U. S. 23, 64 L. ed. 34, refers to the Minnesota Rate cases for the statement of the principle upon which the power of the state to make regulations affecting interstate commerce is recognized by this court. The statement in the Minnesota Rate Cases, (omitting citations, except where quotation therefrom is made) is as follows:

> "(1) The general principles governing the exercise of state authority when interstate com-

merce is affected are well established. The power of Congress to regulate commerce among the several states is supreme and plenary. It is 'complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution.' *Gibbons* v. *Ogden*, 9 Wheat. 1, 196, 6 L. ed. 23, 70. The conviction of its necessity sprang from the disastrous experiences under the Confederation, when the states vied in discriminatory measures against each other. In order to end these evils, the grant in the constitution conferred upon Congress an authority at all times adequate to secure the freedom of interstate commercial intercourse from state control, and to provide effective regulation of that intercourse as the national interest may demand. The words 'among the several states' distinquish between the commerce which concerns more states than one, and that commerce which is confined within one state and does not affect other states. 'The genius and character of the whole government,' said Chief Justice Marshall, 'seems to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the states generally; but not to those which are completely within a particular state, which do not affect other states, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. The completely internal commerce of a state, then, may be considered as reserved for the state itself.' Id. p. 195. This reservation to the states manifestly is only of that authority which is consistent with and not opposed to, the grant to Congress. There is no room in our scheme of government for the assertion of state power in hostility to the authorized exercise of federal power. The authority of Congress extends to every part of interstate commerce, and to every instrumentality or agency by

which it is carried on: and the full control by Congress of the subjects committed to its regulation is not to be denied or thwarted by the commingling of interstate and intrastate operations. This is not to say that the nation may deal with the internal concerns of the state, as such, but that the execution by Congress of its constitutional powers to regulate interstate commerce is not limited by the fact that intrastate transactions may have become so interwoven therewith that the effective government of the former incidentally controls the latter. This conclusion necessarily results from the supremacy of the national power within its appointed sphere. * * *.

"The grant in the Constitution of its own force, that is, without action by Congress, established the essential immunity of interstate commercial intercourse from the direct control of the states with respect to those subjects embraced within the grant which are of such a nature as to demand that, if regulated at all, their regulation should be prescribed by a single authority. It has repeatedly been declared by this court that as to those subjects which require a general system or uniformity of regulation, the power of Congress is exclusive. In other matters, admitting of diversity of treatment according to the special requirements of local conditions, the states may act within their respective jurisdictions until Congress sees fit to act; and, when Congress does act, the exercise of its authority overrides all conflicting state legislation. * * *.

"The principle which determines this classification underlies the doctrine that the states cannot, under any guise, impose direct burdens upon interstate commerce. For this is but to hold that the states are not permitted directly to regulate or restrain that which, from its nature, should be

under the control of the one authority, and be free from restriction, save as it is governed in the manner that the national legislature constitutionally ordains.

"Thus, the states cannot tax interstate commerce, either by laying the tax upon the business which constitutes such commerce or the privilege of engaging in it, or upon the receipts, as such, derived from it * * *; or upon persons or property in transit in interstate commerce * * *.

"They have no power to prohibit interstate trade in legitimate articles of commerce * * *; or to discriminate against the products of other states * * *; or to exclude from the limits of the state corporations or others engaged in interstate commerce, or to fetter by conditions their right to carry it on * * *; or to prescribe the rates to be charged for transportation from one state to another, or to subject the operations of carriers in the course of such transportation to requirements that are unreasonable or pass beyond the bounds of suitable local protection.

"But within these limitations there necessarily remains to the states until Congress acts, a wide range for the permissible exercise of power appropriate to their territorial jurisdiction, although interstate commerce may be affected. It extends to those matters of a local nature as to which it is impossible to derive from the constitutional grant an intention that they should go uncontrolled pending Federal intervention. Thus, there are certain subjects having the most obvious and direct relation to interstate commerce, which nevertheless, with the acquiescence of Congress, have been controlled by state legislation from the foundation of the government because of the necessity that they should not remain unregulated, and that their regulation should be adapted to varying local

exigencies; hence, the absence of regulation by Congress in such matters has not imported that there should be no restriction, but rather that the states should continue to supply the needed rules until Congress should decide to supersede them. Further, it is competent for a state to govern its internal commerce, to provide local improvements, to create and regulate local facilities, to adopt protective measures of a reasonable character in the interest of the health, safety, morals and welfare of its people, although interstate commerce may incidentally or indirectly be involved. Our system of government is a practical adjustment by which the national authority as conferred by the Constitution is maintained in its full scope without unnecessary loss of local efficiency. Where the subject is peculiarly one of local concern, and from its nature belongs to the class with which the state appropriately deals in making reasonable provision for local needs, it cannot be regarded as left to the unrestrained will of individuals because Congress has not acted, although it may have such a relation to interstate commerce as to be within the reach of the Federal power. In such case, Congress must be the judge of the necessity of Federal action. Its paramount authority always enables it to intervene at its discretion for the complete and effective government of that which has been committed to its care, and, for this purpose and to this extent, in response to a conviction of national need, to displace local laws by substituting laws of its own. The successful working of our constitutional system has thus been made possible.

"The leading illustrations may be noted. Immediately upon the adoption of the Constitution, Congress recognized the propriety of local action with respect to pilotage, in view of the necessities of navigation. * * * It was sixty years

before provision for Federal license of pilots was made, * * * and even then port pilots were not included * * *. And while Congress has full power over the subject and to a certain extent has prescribed rules, it is still in a large measure subject to the regulation of the states. * * *

"A state is entitled to protect its coasts, to improve its harbors, bays, and streams, and to construct dams and bridges across navigable rivers within its limits, unless there is conflict with some act of Congress. Plainly, in the case of dams and bridges, interference with the accustomed right of navigation may result. But this exercise of the important power to provide local improvements has not been regarded as constituting such a direct burden upon intercourse or interchange of traffic as to be repugnant to the Federal authority in its dormant state. * * * Thus, in *Gilman* v. *Philadelphia*, 3 Wall. 713, 18 L. Ed. 96, the complainants were the owners of a valuable wharf and dock property in the Schuylkill river, and sought to prevent the construction of a bridge which had been authorized by the Legislature of Pennsylvania to connect East and West Philadelphia. It appeared that the bridge would prevent the passage of vessels having masts which had formerly navigated the river up to the complainants' wharf, and would largely reduce the income from the property. The court affirmed the dismissal of the bill upon the ground that in the absence of legislation by Congress, the State was acting within its authority. 'The States have always exercised this power,' said the court (id. p. 729), 'and from the nature and objects of the two systems of government they must always continue to exercise it, subject, however, in all cases, to the paramount authority of Congress, whenever the power of the states shall be exerted within the sphere of the commercial power which belongs to the Nation.' Again, in

Escanaba & L. M. Transp. Co. v. *Chicago*, 107 U. S. 678, 27 L. ed. 442, 2 Sup. Ct. Rep. 185, the question related to the power of the city of Chicago, acting under the authority of the state, to regulate the closing of draws in the bridges over the Chicago river. The court said: 'The Chicago river and its branches must * * * be deemed navigable waters of the United States, over which Congress, under its commercial power, may exercise control to the extent necessary to protect, preserve and improve their free navigation. But the States have full power to regulate within their limits matters of internal police, including in that general designation whatever will promote the peace, comfort, convenience, and prosperity of their people. This power embraces the construction of roads, canals, and bridges, and the establishment of ferries, and it can generally be execised more wisely by the States than by a distant authority. * * * When its (the State's) power is exercised so as to unnecessarily obstruct the navigation of the river or its branches, Congress may interfere and remove the obstruction * * * But until Congress acts on the subject, the power of the State over bridges across its navigable streams is plenary.' Id. p. 683.

"While the state may not impose a duty of tonnage (* * *) it may regulate wharfage charges and exact tolls for the use of artificial facilities provided under its authority. The subject is one under state control, where Congress has not acted, although the payment is required of those engaged in interstate or foreign commerce. * * * In *Parkersburg & O. River Transp. Co.* v. *Parkersburg*, 107 U. S. 691, 27 L. Ed. 584, 2 Sup. Ct. Rep. 732, the court had before it an ordinance of that city prescribing rates of wharfage on vessels discharging or receiving freight at public landings belonging to the city. A transportation company

having steamers plying between Pittsburgh and Cincinnati complained that the wharfage charge was exorbitant. The court held that the reasonableness of the charge, it being simply one for wharfage, was to be determined by the state law. 'The regulation of wharves belongs *prima facie*, and in the first instance, to the states, and would only be assumed by Congress when its exercise by the states is incompatible with interstate commerce.' Id., p. 703. Again, in *Ouachita & M. River Packet Co.* v. *Aiken*, 121 U. S. 444, 30 L. Ed. 976, 1 Inters. Com. Rep. 379, 7 Sup. Ct. Rep. 907, where the owners of steamboats engaged in interstate commerce on the Mississippi river complained of wharfage rates at New Orleans as unreasonable and excessive, and in effect 'a direct duty, or burden, upon commerce,' the court, overruling the contention, held that the case was 'clearly within the principle of the former decisions of this court, which affirm the right of a state, in the absence of regulation by Congress, to establish, manage, and carry on works and improvements of a local character, though necessarily more or less affecting interstate and foreign commerce.' Id. p. 447.

"Quarantine regulations are essential measures of protection which the states are free to adopt when they do not come in conflict with Federal action. In view of the need of conforming such measures to local conditions, Congress from the beginning has been content to leave the matter for the most part, notwithstanding its vast importance, to the states, and has repeatedly acquiesced in the enforcement of state laws. * * * Such laws, undoubtedly operate upon interstate and foreign commerce. They could not be effective otherwise. They cannot, of course, be made the cover for discriminations and arbitrary enactments having no reasonable relation to health (* * *);

but the power of the state to take steps to prevent the introduction or spread of disease, although interstate and foreign commerce are involved (subject to the paramount authority of Congress if it decides to assume control,) is beyond question. * * * In *Compagnie Francaise de Navigation 'a Vapeur* v. *State Bd. of Health,* 186 U. S. 380, 46 L. ed. 1209, 22 Sup. Ct. Rep. 811, the court had before it the quarantine law of Louisiana, which, among other things provided the state board of health might 'in its discretion prohibit the introduction into any infected portion of the state persons acclimated, unacclimated, or said to be immune, when, in its judgment, the introduction of such persons would add to or increase the prevalence of the disease.' The supreme court of the state, interpreting the statute, held that it empowered the board to exclude healthy persons from a locality infested with a contagious or infectious disease, whether they came from without or within the state. It was objected that this provision was too broad, and that the former decisions of the court were based upon the right of the states to exclude diseased persons and things which were not legitimate subjects of commerce. The court sustained the law, saying, with respect to this argument: 'But it must be at once observed that this erroneously states the doctrine as concluded by the decisions of this court previously referred to, since the proposition ignores the fact that some cases expressly and unequivocally hold that the health and quarantine laws of the several states are not repugnant to the Constitution of the United States, although they affect foreign and domestic commerce, as in many cases they necessarily must do in order to be efficacious, because until Congress has acted under the authority conferred upon it by the Constitution, such state health and quaran-

tine laws producing such effect on legitimate interstate commerce are not in conflict with the Constitution. True is it that, in some of the cases relied on in the argument, it was held that a state law absolutely prohibiting the introduction, under all circumstances, of objects actually affected with disease, was valid because such objects were not legitimate commerce. But this implies no limitation on the power to regulate by health laws the subjects of legitimate commerce. In other words, the power exists until Congress has acted, to incidentally regulate by health and quarantine laws, even though interstate and foreign commerce is affected; and the power to absolutely prohibit additionally obtains where the thing prohibited is not commerce, and hence not embraced in either interstate or foreign commerce.' Id. p. 931.

"State inspection laws and statutes designed to safeguard the inhabitants of a state from fraud and imposition are valid when reasonable in their requirements, and not in conflict with Federal rules, although they may affect interstate commerce in their relation to articles prepared for export, or by including incidentally those brought into the state and held for sale in the original imported packages. * * *. And for the protection of its game and the preservation of a valuable food supply, the state may penalize the possession of game during the closed season, whether obtained within the state or brought from abroad. * * *

"Interstate carriers, in the absence of Federal statute providing a different rule, are answerable according to the law of the state for nonfeasance or misfeasance within its limits. * * * Until the enactment by Congress of the act of April 22, 1908, chap. 149, 35 Stat. at L. 65, U. S. Comp. Stat. Supp. 1911, p. 1322, the laws of the states

determined the liability of interstate carriers by railroad for injuries received by their employees while engaged in interstate commerce, and this was because Congress, although empowered to regulate the subject, had not acted thereon. In some states the so-called fellow-servant rule obtained; in others, it had been abrogated; and it remained for Congress, in this respect and other matters specified in the statute, to establish a uniform rule. * * *

"So, where Congress has not intervened, state statutes providing damages for wrongful death may be enforced not only against land carriers, but also against the owners of vessels engaged in interstate commerce where the wrong occurs within the jurisdiction of the state * * * And until Congress legislated on the matter, liability for loss of property, on interstate as well as intrastate shipments, was subject to state regulation. Some states allowed an exemption by contract from all or a part of the common-law liability; others allowed no exemption. These differences in the applicable laws created inequalities with respect to interstate transportation, but each state exercised the power inherent in its territorial jurisdiction, and the remedy for the resulting diversity lay with Congress, which was free to substitute its own regulations; and this was done in the recent amendment of Sec. 20 of the act to regulate commerce. * * * It is within the competency of a state to create and enforce liens upon vessels for supplies furnished under contracts not maritime in their nature, and it is no valid objection that the state law may obstruct the prosecution of a voyage of an interstate character. * * * It may also create liens for damages to property on land, occasioned by negligence of vessels. * * * Cars employed in interstate commerce may be seized by attachment under state law, in order to compel the pay-

ment of debts. * * * And the legislation of the states, safeguarding life and property and promoting comfort and convenience within its jurisdiction, may extend incidentally to the operations of the carrier in the conduct of interstate business, provided it does not subject that business to unreasonable demands, and is not opposed to Federal legislation. * * * It has also been held that the state has the power to forbid the consolidation of state railroad corporations with competing lines although both may be interstate carriers, and the prohibition may have a far-reaching effect upon interstate commerce. * * *

"Again, it is manifest that when the legislation of the state is limited to internal commerce to such degree that it does not include even incidentally the subjects of interstate commerce, it is not rendered invalid because it may affect the latter commerce indirectly. In the intimacy of commercial relations, much that is done in the superintendence of local matters may have an indirect bearing upon interstate commerce. The development of local resources and the extension of local facilities may have a very important effect upon communities less favored, and to an appreciable degree alter the course of trade. The freedom of local trade may stimulate interstate commerce, while restrictive measures within the police power of the state, enacted exclusively with respect to internal business, as distinguished from interstate traffic, may in their reflex or indirect influence diminish the latter and reduce the volume of articles transported into or out of the state. It was an objection of this sort that was urged and overruled in *Kidd* v. *Pearson*, 128 U. S. 1, 32 L. ed. 346, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6, to the law of Iowa prohibiting the manufacture and sale of liquor within the state, save for limited purposes. * * * When, however, the state, in dealing with its internal com-

merce, undertakes to regulate instrumentalities which are also used in interstate commerce, its action is necessarily subject to the exercise by Congress of its authority to control such instrumentalities so far as may be necessary for the purpose of enabling it to discharge its constitutional function. * * *

"Within the state power, then, in the words of Chief Justice Marshall, is 'that immense mass of legislation which embraces everything within the territory of a state, not surrendered to the general government; all which can be most advantageously exercised by the states themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of the state, and those which respect turnpike roads, ferries, etc., are component parts of this mass. No direct general power over these objects is granted to Congress; and, consequently, they remain subject to state legislation. If the legislative power of the Union can reach them, it must be for national purposes; it must be where the power is expressly given for a special purpose, or is clearly incidental to some power which is expressly given.' *Gibbons* v. *Ogden*, 9 Wheat. 203, 204. 6 L. ed. 71, 72.

"And whenever, as to such matters under these established principles, Congress may be entitled to act, by virtue of its power to secure the complete government of interstate commerce, the state power nevertheless continues until Congress does act, and by its valid interposition limits the exercise of the local authority."

In the case of *Public Utilities Commission* v. *Landon*, *supra*, in speaking of the business of this very company, this court said:

"That the transportation of gas through pipe lines from one state to another is interstate com-

> merce may not be doubted; also it is clear that as part of such commerce, the receivers might sell and deliver gas so transported to local distributing companies, free from unreasonable interference by the State."

Beyond any doubt, any attempt to directly regulate the rates to be charged by Kansas Natural would be an "unreasonable interference by the State" with the transportation in interstate commerce carried on by Kansas Natural. Any "direct regulation" of commerce is an "unreasonable interference."

From the Minnesota Rate cases, it appears that until such time as Congress shall act, it is permissible for the states to make local regulations which may indirectly affect interstate commerce—but such regulations may never be of such a character as to directly fix the rates to be charged for transportation from one state to another. Or, if we adopt the classification of commerce that is sought to be made by the appellants. (to-wit: "local" and "national") there are certain aspects of interstate commerce national in character (which might be called "national interstate commerce") over which the State can never exercise control. These national aspects of interstate commerce include: (1) Taxation of interstate commerce; (2) taxation of persons or property in transit in interstate commerce; (3) the power to prohibit interstate trade in legitimate articles of commerce; (4) the power to discriminate against the products of other states; and (5) the power to prescribe rates to be charged for transportation from one state

into another. As to these matters, the power of Congress is supreme, and with reference thereto, there is vested in the States no permissible exercise of authority. While with respect to other phases of interstate commerce which are local in character (or as complainants describe it "interstate commerce of a local nature") among which phases there is included the power on the part of the state to make harbor and quarantine regulations, the power to enforce inspection laws, and other local regulations of a police nature, the power of states to exercise control is unimpaired, unless and until the Congress itself under the superior power vested in it enters the particular field of regulation.

Another case to which the attention of the Court is most respectfully invited, is the case of *Dahnke-Walker Milling Company* v. *Bondurant*, 257 U. S. 282, 66 L. ed. 239, 42 Sup. Ct. Rep. 106, in which there was presented to the Court the question of the right of the state to prevent an engagement in interstate commerce within the limits of the state, except upon conditions imposed by the State. This court in the opinion in that case, page 290, said:

> "Where goods in one state are transported into another for purposes of sale, the commerce does not end with the transportation, but embraces as well the sale of the goods after they reach their destination and while they are in the original packages. *Brown* v. *Maryland*, 12 Wheat. 419, 6 L. ed. 688; *American Steel & Wire Company* v. *Speed*, 192 U. S. 500, 519; 48 L. ed. 538, 546; 24 Sup. Ct. Rep. 365. On the same principle where goods are purchased in one state for transportation to another,

> the commerce includes the purchase quite as much as it does the transportation. *American Express Co.* v. *Iowa*, 196 U. S. 133, 143; 49 L. ed. 417, 422; 25 Sup. Ct. Rep. 182."

In the case of *Barton* v. *Clyne*, 258 U. S. 495, 66 L. ed. 735, this Court in construing an Act of Congress regulating and controlling among other things commission men and traders at live stock markets, held that the sale of live stock was but a part of interstate commerce, and therefore the Act of Congress which regulated the business of the commission men and traders at the stockyards was valid. The court in the opinion said:

> "Stockyards and sales are necessary factors in the middle of this current of commerce."

The natural gas introduced into the State of Missouri by Kansas Natural does not come to rest in the State of Missouri as the property of Kansas Natural. It is constantly moving in interstate commerce until the moment and act of delivery to the distributing companies. The record in the case (Trans. 40) shows:

> "That there are no advance orders given by the Kansas City Gas Company to Kansas Natural Gas Company for the shipment of any definite quantity of gas to Kansas City, Missouri, at any given time, but said gas is furnished and delivered continuously to meet the requirements of the Kansas City Gas Company, as governed by the requirements of its consumers from time to time."

Transportation is but a part of commerce. The sale of the goods transported is usually the object of the transportation, and in fact, the very act of com-

mercial intercourse to which the immunity from state interference was intended to be conferred by the Constitution. Goods destined for interstate commerce are not only free from state regulation during the period of transportation, but are also free from such state interference and regulation in connection with the sale itself.

These remarks are thought pertinent, because of the position of appellants as indicated on page 68 of their brief, wherein they say:

> "It cannot be too strongly impressed or too often reiterated that the supply company in the last analysis is not primarily engaged in interstate commerce. It is engaged in the business of furnishing natural gas locally to local distributing companies, for local use."

We feel that appellants are confused in their statement, because the business of furnishing natural gas that has been necessarily transported from one state into another is as much a part of interstate commerce as is the act of transportation itself. The commerce conducted by Kansas Natural does not deal alone with the mere transportation of natural gas, but involves the production of the natural gas in Oklahoma or Kansas, or the purchase of natural gas in Kansas and Oklahoma, and its transportation from Kansas and Oklahoma to the State of Missouri, and its sale and delivery in the State of Missouri to the local distributing companies. The production, the purchase, the transportation, the sale, and the delivery in its several and united

results, constitutes the interstate commerce that is conducted by Kansas Natural.

The complainants and intervenor below (appellants herein) rely upon the decision of this court in the case of *Pennsylvania Gas Company* v. *Commission*, 252 U. S. 23, 64 L. ed. 434. In the Pennsylvania Gas case, this court upheld the power of the New York Commission to regulate the rates to be charged to consumers for natural gas by the Pennsylvania Gas Company, notwithstanding the fact that the Pennsylvania Gas Company procured its gas within the State of Pennsylvania and transported it by pipe lines from Pennsylvania to the State of New York where it sold and distributed such gas to consumers in the City of Jamestown, pursuant to a franchise granted by state authority. It appears to us that there is a clear, well-defined distinction between the case at bar and the Pennsylvania Gas case.

In the Pennsylvania Gas case the state was regulating the right to exercise the franchise which was granted by the state. The state was regulating in a direct way a local business carried on under authority of and within the state, to-wit: the distribution and sale of natural gas. In this court's opinion in the Pennsylvania Gas case, it is said:

> "The thing which the state commission has undertaken to regulate, while part of the interstate transmission is local in its nature and pertains to the furnishing of natural gas to local consumers within the City of Jamestown in the State of New York. The pipes which reach the consumers served are supplied with gas directly from the mains of

the company where it brings it into the state; nevertheless, the service rendered is essentially local, and the sale of gas is by the company to the local consumers who are reached by the use of the streets of the city in which the pipes are laid and through which the gas is conducted to factory and residences as it is required for use. The service is similar to that of a local plant furnishing gas to consumers in a city.

"This local service is not of that character which requires general and uniform regulation of rates by Congressional action and which has always been held beyond the power of the states, although Congress has not legislated upon the subject. While the manner in which the business is conducted is part of interstate commerce, its regulation in the distribution of gas to local consumers is required in the public interest, and has not been attempted under the superior authority of Congress.

"It may be conceded that the local rates may affect the interstate business of the company, but this fact does not prevent the state from making local regulations of a reasonable character. Such regulations are always subject to the exercise of authority by Congress, enabling it to exert its superior power under the Commerce Clause of the Constitution."

The Pennsylvania case is expressly decided upon the principles announced in the Minnesota Rate Cases. In the opinion in the Pennsylvania gas case, this court said:

"In dealing with interstate commerce, it is not, in some instances, regarded as an infringement upon the authority delegated to Congress to permit the states to pass laws indirectly affecting such commerce when needed to protect or regulate matters

> of local interest. Such laws are operative until Congress acts under its superior authority by regulating the subject-matter for itself. In varying forms, this subject has frequently been before this court. The previous cases were fully reviewed and deductions made therefrom in the Minnesota Rate Cases."

In the Pennsylvania case the company was engaged in doing business that was readily divisible into two distinct elements: (a) the production or purchasing and transportaton of natural gas from Pennsylvania to New York. (This phase of the business is clearly interstate commerce, and as such was free from direct regulation by the state); and (b) the sale and distribution of such natural gas to the public in the city of Jamestown, New York, pursuant to a franchise granted by state authority. (This phase of the business is "the thing which the state commission has undertaken to regulate, and is local in its nature," and, primarily, is subject to state regulation and control.)

The holding of this court was to this effect: (1) it was conceded in the court below that a company using the streets of a city for the distribution and sale of gas to consumers for public use was subject to regulation by the state as to the rates to be charged by such company to consumers; and (2) that this power of regulation was not lost to the state by reason of the fact that the company enjoying the franchise produces or purchases such gas (so distributed and sold pursuant to the franchise) at points outside of the state and trans-

ports the same from such points outside of the state to the place in the state in which such gas was distributed and sold; and this holding was based upon the principle that this phase of the business, to-wit: the transportation of gas from without to within the state, which is, of course, interstate commerce, is only indirectly or incidentally affected by the application of the local regulations as to rates made pursuant to the local franchise; and (3) that the state could continue to exercise the power of regulating and controlling such rates until the Congress under its superior authority should enter the field and itself exercise the power of regulation with respect to such rates.

The following points of distinction between the Pennsylvania gas case and the case at bar are readily discernible:

(1) The Pennsylvania Gas Company was operating in the City of Jamestown pursuant to a franchise. "The petitioner has lost that right (the right to itself control its price) by acceptance of a public franchise in consideration of a public service." *Re. Pennsylvania Gas Co.* v. *Commission*, 225 N. Y. 397, Pub. Ut. Rep. 1916-C 663, l. c. 671. The Kansas Natural is not operating in any city in Missouri pursuant to any franchise, license or privilege.

(2) The Pennsylvania Gas Company was distributing gas for public use—the Kansas Natural does not distribute gas for public use.

(3) The Pennsylvania Gas Company was furnishing gas to consumers thereof—the Kansas Natural does not furnish gas to consumers.

(4) The Pennsylvania Gas Company by virtue of the fact that it was operating in the city of Jamestown pursuant to a franchise was under a public obligation to the state to furnish gas in the City of Jamestown, this being an obligation which, of course, it must have voluntarily assumed. The Kansas Natural is under no obligation (contractual or statutory) to furnish gas to any distributing company in Missouri. It owes no public duty to the state of Missouri except only such as is due from all foreign corporations.

(5) In the Pennsylvania case, "it was conceded that the Public Service Commission had jurisdiction of the subject-matter and person of the respondent, unless its jurisdiction is an unconstitutional restriction upon inter-state commerce." *Re. Pennsylvania Gas Co.* v. *Commission*, 184 App. Div. 556, 171 N. Y. S. 1028, 1919-A Pub. Ut. Rep. 372, l. c. 373.—In the case at bar we confidently assert it is established that the Commission is without jurisdiction of the subject-matter, to-wit: the business of Kansas Natural in supplying gas to distributing companies, and this without respect to the business being inter-state commerce.

(6) Pennsylvania Gas Company having accepted a franchise through the authority of the State of New York under which franchise it entered upon the public streets and highways of the state for the purpose of conducting the distinctly local business of furnishing gas to consumers, was in no position to assert as against the state any lack of power on the part of the state to control the franchise which it had granted and

the Pennsylvania Gas Company had accepted.—Kansas Natural having accepted no franchise, and being under no obligation to the state of Missouri (except only such obligation as foreign corporations generally assume) is not estopped or prevented from asserting the inherent lack of power of the state to regulate the interstate commerce conducted by it.

There is absent in the case at bar every element relied upon in the Pennsylvania case to sustain the power of state regulation; there is absent in the case at bar every element of local business which could invest the Commission with the power of rate regulation.

In the Pennsylvania case the state having the power to regulate the business of a local gas distributing company, and it being established and conceded that Pennsylvania Gas Company was engaged in such business, this court held that such power was not to be taken from the state because of the fact that the company procured gas from outside of the state and transported it in interstate commerce to places within the state where it distributed such gas as a local gas distributing company. In other words, this court in the Pennsylvania case sustained the power of state regulation upon the theory that the regulation concerned matter of a local nature, to-wit: the exercise of a state franchise which was a matter only auxiliary to commerce and that such regulation only incidentally and indirectly affected interstate commerce, and was therefore within the permissible power of the state. As a matter of fact, the Pennsylvania case and the case of *Public Utilities Com-*

mission v. *Landon*, 249 U. S. 236, 63 L. ed. 577, Pub. Ut. Rep. 1916-C, 834, 39 Sup. Ct. Rep. 268, were decided upon the application of the same principle. In the Landon case, the receiver of Kansas Natural was selling gas to various distributing companies, including all of the distributing companies referred to in the case at bar under arrangements whereby the receiver was entitled as compensation for such gas to receive from the distributing companies a percentage of the amounts received from the sale. The Kansas Commission made an order regulating the rates to the consumers, which the Receiver contested upon the grounds that it was a regulation of the interstate commerce carried on by receiver. This court denied that the order directly affected or regulated the interstate commerce, but, as noted in the Pennsylvania case, held that "the rates to be charged to the local consumer had but an indirect effect upon such interstate commerce, and therefore the matter of rates was subject to state regulation."

Another way of distinguishing the Pennsylvania case from the Kansas Natural case, is this:

The Pennsylvania Company was engaged in performing two classes of business, to-wit: (a) interstate commerce in the transportation of gas from Pennsylvania to New York; and (b) the purely local business of the distribution and sale of gas in one city, one town, and one village in New York, which could only be done by virtue of the consent of the city, town or village, or of the state. When the Pennsylvania Gas Company sought and obtained the consent of the State

to enter upon the public streets and highways of the state for the purpose of distributing gas to consumers they thereby consented to engage in a local business, and to become subject to local regulation. They engaged in a business which generally throughout this country is subject to some form of state control with respect to rates. The local business done in the City of Jamestown, we may assume, was a substantial part of the whole transaction of transporting and delivering gas. In the case at bar, it will be noted that Kansas Natural either produces or purchases and then transports gas from Oklahoma and southern Kansas to Kansas City, Missouri, and is enabled to sell the gas at the city limits to the local company at forty cents per thousand cubic feet. The local distributing company receives such gas and then distributes it in its own mains to consumers and collects therefor at the rate of eighty-five cents per thousand cubic feet, and in addition thereto, receives fifty cents per month per customer as a "service charge." The business done by the local distributing company (i. e. the local business of distributing gas) is a matter involving greater cost to the ultimate consumer than is the business of Kansas Natural in producing or purchasing such gas from a producer and transporting such gas from Oklahoma to Kansas City.

We assume in the Jamestown case that the cost of rendering the purely local business, and the cost of what might be termed the interstate business, bore substantially the same relationship to each other as that shown in the case at bar. In view, therefore, of the

entire transaction, it was proper for the state to exercise its right to control rates to be charged by the local gas distributing agency, notwithstanding the fact that thereby, but in an incidental way, and indirectly only, such regulation affected interstate commerce. But, the only business done by Kansas Natural in Missouri is the delivery of gas transported in interstate commerce. There is no local business. The regulation of rates of Kansas Natural would directly affect and hinder interstate commerce.

In the case of *Pennsylvania* v. *West Virginia*, ... U. S. ....., 67 L. ed. 762, (decided by this court on June 11th, 1923), it was held:

> "Natural gas is a lawful article of commerce and its transmission from one state to another for sale and consumption in the latter is interstate commerce. A state law, whether of the state where the gas is produced, or that where it is sold, which by its necessary operation prevents, obstructs or burdens such transmission, is a regulation of interstate commerce,—a prohibited interference. *West* v. *Kansas Natural Gas Co.*, 221 U. S. 229; *Public Utilities Co.* v. *Landon*, 249 U. S. 236, 245.
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> "*United Fuel Gas Co.* v. *Hallahan*, 257 U. S. 277; *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282, 290-291; *Lemke* v. *Farmers Grain Co.*, 258 U. S. 50; *Western Union Telegraph Co.* v. *Foster*, 247 U. S. 105; *Minnesota* v. *Barber*, 136 U. S. 313, *Brimmer* v. *Rebman*, 138 U. S. 78."

Decisions of the Supreme Court of Kansas in re: Kansas Natural Gas Company.

In the case of *State ex. rel.* v. *Kansas Natural*, 111 Kan. 809, the Supreme Court of Kansas held that

Kansas Natural was subject to regulation by the public utilities Commission of that state with respect to rates to be charged by Kansas Natural for the sale of gas to local distributing companies within the State of Kansas. The business of Kansas Natural in Kansas was substantially identical with the business transacted by Kansas Natural in Missouri. The decision grew out of the same controversy presented here. The Kansas court in arriving at its decision, cited its prior decisions in the case of *State ex. rel.* v. *Flannelly*, 96 Kan. 373, and *State ex. rel.* v. *Gas Company*, 100 Kan. 593.

In the two cases cited, Kansas Natural or its receivers were parties, and in both cases, the Supreme Court of Kansas also came to the conclusion that Kansas Natural was subject to regulation as to rates by the State Commission.

In the case of *State ex rel.* v. *Gas Company*, 100 Kan. 593, the Supreme Court of Kansas only referred to its prior decision in the Flannelly case (96 Kan. 373) as authority for the decision in the case then at bar. So that, a consideration of the Flannelly case really disposes of the two cases cited in the late case of *State ex rel.* v. *Kansas Natural*, 111, Kan. 809.

In the Flannelly case, the Supreme Court of Kansas was called upon to review an order of the Commission establishing rates to consumers for gas furnished by local distributing companies. The rates thus established were contested by Kansas Natural upon the ground that Kansas Natural by reason of its supply contracts with the local distributing companies (under the terms of

which supply contracts Kansas Natural had agreed to accept as compensation for gas furnished by Kansas Natural to local distributing companies a definite proportion of the gross amounts paid by consumers to said local distributing companies) was directly affected and concerned by any rates fixed for the distribution of gas to consumers, and that as Kansas Natural was engaged in interstate commerce, the action of the Commission in fixing rates to be charged by the distributing companies was under all of the circumstances a direct regulation of the interstate commerce conducted by Kansas Natural.

The point made by Kansas Natural that it was so interested in the rates authorized to be charged by the local distributing companies was the same point presented in this court by Kansas Natural in the case of *Public Utilities Commission* v. *Landon, supra.* In the District Court in the Landon case (234 Fed. 152) it was held that Kansas Natural had such a relationship to the distribution of gas to consumers that Kansas Natural might contest rates fixed by the Commission. But, it was upon this point that this court reversed the district court. This court upon this point said:

> "But we cannot agree with its (the trial court's) conclusion that local companies in distributing and selling gas to their customers acted as mere agents, immediate representatives or instrumentalities of the receivers, and as such carried on without interruption interstate commerce set in motion by them."

The Supreme Court of Kansas did not rule the Flannelly case upon the principles announced by this court in the Landon case, but on the contrary, it accepted the contention made by Kansas Natural (and incidentally the Commission did not oppose such contention) that by reason of the supply contracts, it was concerned and affected by the rates fixed by the Commission. The Supreme Court, however, denied the contention of Kansas Natural that the action of the Commission in fixing rates to consumers was in conflict with the commerce clause of the Constitution. The Supreme Court's decision was based upon the following propositions:

(1) That in accordance with the doctrine of the original package cases, Kansas Natural, having transported gas in interstate commerce into Kansas and in such state delivered such gas to various local distributing companies, such delivery constituted a break in the original package, and that upon such break, the product ceased to be in interstate commerce, and the subject-matter was then subject to regulation by the state. (2) That although the business of supplying gas to consumers was interstate commerce, it was not national interstate commerce; that the business admitted of no uniform system of regulation, and was therefore, not that class of interstate commerce which requires exclusive regulation by Congress, and for that reason such commerce was subject to regulation by the state with respect to the rates to be charged for such gas so transported and sold,

It is significant that in the Flannelly case the Supreme Court of Kansas made the observation that the distributing companies before selling natural gas to consumers were required under the laws of the state to obtain a franchise from the various cities in which they were operating.

In further support of its decision in the Flannelly case, the Supreme Court of Kansas cited the case of *Jamison* v. *Indiana Natural Gas Company*, 120 Ind. 555, 28 N. W. 76, 12 L. R. A. 562, and the case of *Manufacturers' Light & Heat Company* v. *Ott*, 215 Fed. 940.

In the Jamison case, the regulation under review was one concerning the pressure of natural gas being transported through pipes. The Supreme Court of Indiana upheld the regulation, notwithstanding the fact that it applied to gas transported in interstate commerce, upon the ground that the regulation was not *per se* a regulation of interstate commerce, but a regulation made in the exercise of police power, and one that, therefore, came within the principles announced by this court that states may regulate matters which indirectly and incidentally affect interstate commerce until such time as Congress enters the particular field of regulation. Clearly, the Jamison case is not an authority that establishes the proposition that a state may make regulations directly affecting interstate commerce, or that establishes the proposition that the fixing of rates to be charged for transportation in interstate commerce is within the lawful power of states.

In the case of *Manufacturers' Light & Heat Company* v. *Ott*, 215 Fed. 940, the decision was based upon substantially the same facts as existed in and by the application of the same principle applied in the Pennsylvania case, *supra*. The regulation made (and this regulation was upheld) applied to the rates for natural gas to consumers in West Virginia to be charged by a corporation operating in the State of West Virginia, under the authority of the State.

The late case in Kansas (*State ex rel.* v. *Kansas Natural*, 111 Kan. 809) is in our opinion erroneously decided. It seeks to apply the principles of the earlier Kansas case to a situation that is entirely different from that assumed to exist in the earlier cases. In the earlier Kansas case, it was assumed (in fact it was contended by Kansas Natural) that there was such a relationship between Kansas Natural and the local distributing companies arising out of and by virtue of the supply contracts, that the local distributing companies were, in fact, the mere agents or immediate representatives or instrumentalities of Kansas Natural, and as such they (the local companies) carried on without interruption the interstate commerce set in motion by Kansas Natural, or in other worrds, it was in effect contended that Kansas Natural was itself selling and distributing gas to local consumers pursuant to franchises held by its agents, the distributing companies. If the contention of the Kansas Natural in that respect was well-founded, then the earlier Kansas cases were in point of fact very close to, if not identical with, the Penn-

sylvania case; but this court in the Landon case; *supra,* held that Kansas Natural had no such relationship to the distributing companies or to the consumers of the distributing companies as would justify the claim made by it. After the decision of this court in the Landon case by the order of the United States District Court in the receivership proceedings, the supply contracts between Kansas Natural and the various distributing companies were held to be void, so that any basis upon which even a contention might be made that Kansas Natural was concerned with the rates to the consumers was eliminated. (Trans. 73).

As the business of Kansas Natural is conducted today, its transactions in connection with the sale of gas to local distributing companies are as disconnected with and independent of the transactions between local distributing companies and their consumers as any two distinct and independent transactions could possibly be. Kansas Natural is not concerned with the rates charged to consumers by local gas distributing companies. Of course, Kansas Natural is concerned, just as any business institution is concerned, with the solvency of its customers. If the rates authorized to be charged by the local distributing companies be fixed so low that the local distributing companies cannot pay Kansas Natural for gas, it would have a bearing upon the business of Kansas Natural; but Kansas Natural for that reason would not, of course, be authorized to contest the validity of such rates.

As the agency theory has been denied by this court in the Landon case, and any basis of an agency theory has been destroyed by the setting aside of the supply contracts, the proposition advanced by the Supreme Court of Kansas in the earlier cases that the business being transacted by Kansas Natural is within the exception recognized by this court in the original package cases, is without application, for the doctrine of the original package cases was sought to be applied upon the assumption that Kansas Natural was under obligation to furnish gas to consumers in each city to which it supplied gas, and, therefore, when Kansas Natural delivered gas into the local mains (it continuing at that time to be concerned with such gas) there was an allocation or setting aside of the product for local use, and by reason thereof such product (after being set aside) lost its previous status of property being transported in interstate commerce that the transportation had ended, and the property was subject to the laws of the state. But in the Landon case, this court held Kansas Natural was engaged in interstate commerce up to and including the delivery of gas to the local distributing companies—and beyond that point, Kansas Natural was not concerned.

There is left in the earlier Kansas cases, therefore, but one proposition, and that is: That the business conducted by Kansas Natural is interstate commerce of a local nature, over which Congress has not exercised authority, and as a result, such commerce is subject to regulation by the state, even with respect to the rates to

be charged therefor until such time as Congress enters the field. This proposition goes to the very marrow of the case at bar. It is unnecessary for us to repeat here the arguments hereinbefore made with respect to the lack of such power on the part of the state. We respectfully contend that the states are without power to do this.

In addition to citing the earlier Kansas cases, the Supreme Court of Kansas in the case of *State ex rel.* v. *Gas Company*, 111 Kan. 809, also cited the Landon case, and the Pennsylvania Gas case. With respect to the Pennsylvania Gas case, the Supreme Court of Kansas said:

> "In the last case (the Pennsylvania case) gas was produced in Pennsylvania, was transported through pipe lines to Jamestown, N. Y., and there was sold directly to the consumer by the producing company. There was no intervening distributing company. That case involved the validity of an order made by the Public Service Commission of New York regulating the rates at which the Pennsylvania Gas Company should furnish gas to its customers in the city of Jamestown. The headnote to the opinion reads:
>
> " 'The transmission and sale of natural gas, produced in one state and transported and furnished directly to consumers in a city of another state by means of pipe lines from the source of supply in part laid in the city streets, is interstate commerce; but, in the absence of any contrary regulation by Congress, is subject to local regulation of rates.'
>
> "The only difference between the present case and the Pennsylvania Gas Company case is that

here the gas is sold to distributing companies who in turn sell it to the consumer, while in the Pennsylvania Gas case, the gas was sold directly to the consumer. So far as the Kansas Natural Gas Company is concerned, the distributing companies in this state may be considered the consumers of the gas sold. If that is correct, there is no difference between the present case and the Pennsylvania Gas Company case."

We feel that the Supreme Court of Kansas was not justified in assuming that the only difference between the Kansas Natural case and the Pennsylvania case lies in the fact that in the case of Kansas Natural, gas was sold to distributing companies, who in turn sold the gas to consumers, while in the Pennsylvania Gas case, gas was sold directly to consumers. We feel that the court was in error in its assumption that the distributing companies might be considered to be the consumers of the gas sold to them by Kansas Natural, and that thereby Kansas Natural may be brought within the rule established by this court in the Pennsylvania case. The one very sufficient reason why local distributing companies may not be considered to be the consumers of the gas sold to them by Kansas Natural is that local distributing companies are not the consumers of the gas sold to them by Kansas Natural, but are mere merchants of the gas sold to them. "The sale of gas to a concern for the purpose of resale is not a sale for public use." *State ex rel.* v. *Spokane*, *supra*. The essence of the decision of this court in the Pennsylvania Gas case is apparently overlooked by the Supreme Court of Kansas in the decision in the Kan-

sas Natural case. In the Pennsylvania case, the company was operating in the city of Jamestown, New York, pursuant to a local franchise, and it was this business (i. e. the business of distributing and selling gas to consumers in the City of Jamestown, New York, pursuant to a local franchise) that the State was regulating, and it was because of the fact that the pipe line company was engaged in the purely local business of selling gas to its consumers in the city of Jamestown, New York, pursuant to a local franchise, that the court upheld the power and authority of the State to make regulations with respect to rates to such consumers. Kansas Natural was not and is not operating at any place within the State of Kansas pursuant to a local franchise; it is engaged in no public business; its sale and delivery of gas to local distributing companies within that State is nothing more than a private sale and delivery in interstate commerce: Kansas Natural does no business of a local nature; it operates no place in the State of Kansas pursuant to authority granted by the State.

The regulation of rates of Kansas Natural sought to be imposed cannot be upheld on the theory that the regulation thereof may be effected pursuant to police power. We recognize that some courts have defined the term "police power" in terms so broad that the regulation of rates is said to be made pursuant to the exercise of police power. But a State may not act contrary to the Constitution of the United States under the cloak of police power. The Constitution has vested Congress with direct control of interstate commerce.

No direct regulation of such commerce may be exercised by the States under the theory of police power.

> "The decisions also show that a State cannot avoid the operation of this rule by simply invoking the convenient apologetics of the police power. It repeatedly has been said or implied that a direct interference with commerce among the States could not be justified in this way. 'The State can do nothing which will directly burden or impede the interstate traffic of the company, or impair the usefulness of its facilities for such traffic.'"
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> *Kansas City Southern R. Co.* v. *Kaw Valley Drainage Dist.*, 233 U. S. 75, 58 L. ed. 857.

The doctrine that a state may not under the guise of police power make direct regulations of interstate commerce was applied to the attempted exclusion of intoxicating liquors by a statute of Iowa, *Bowman* v. *C. & N. W. R. Co.*, 125 U. S. 465. This court, in its opinion, said:

> "It is not an inspection law; it is not a quarantine or sanitary law; it is essentially a regulation of commerce among the states within any definition heretofore given of that term or which can be given; and although its motive and purpose is to perfect the policy of the State of Iowa in protecting its citizens against the evils of intemperance, it is none the less on that account a regulation of commerce. If it had extended its provisions so as to prohibit the introduction into the state from foreign countries of all importations of intoxicating liquors produced abroad, no one would doubt the nature of the provision as a regulation of foreign commerce. Its nature is not changed by its application to commerce among the states."

"Where there is a conflict between the power of Congress to regulate commerce among the states and the exercise of police power by the state, the police power must yield; for if this were not so, as was stated by Justice Catron in the License cases, 5 How. 504, 600: 'The power to regulate commerce instead of being paramount over the subject would become subordinate to the state police power; for it is obvious that the power to determine the articles which may be the subject of commerce and thus to circumscribe its scope and operation is, in effect, the controlling one. The police power would not only be a formidable rival, but in its struggle must necessarily tramp over the commercial power, as the power to regulate is dependent upon the power to fix and determine upon the subjects to be regulated.' "

The principle announced by the Supreme Court of Kansas (i. e. that a state may directly regulate interstate commerce of a local nature in the absence of congressional action) has never received the approval of this court. The contrary of this rule has been repeatedly announced by this court. The rules of this court with respect to interstate commerce of a local nature (if there be any such commerce so recognized) were announced in the case of *Covington Bridge Co.* v. *Kentucky*, 154 U. S., l. c. 218, in which case it was held that it was interstate commerce to travel by means of a bridge between Covington in Kentucky and Cincinnati in Ohio across the Ohio River, and that because such travel was interstate, it was beyond the power of the state to regulate the toll for the use of the bridge. If transportation across a bridge over a boundary stream between two

states be not subject to state regulation as to rates, notwithstanding the local character of the service afforded by such bridge, then it appears impossible to conceive how any business that is interstate can be confined to such narrow limits as to authorize the states in exercising the power of direct regulation. The Constitution of the United States answers all such contentions. The power to regulate commerce among the states is in Congress—there is no exception recognized by the Constitution of the United States, and this court has never given its sanction (at least since its decision in the Wabash case, *supra*) to any attempt by the states to directly regulate such commerce.

We feel, therefore, that the decision of the Supreme Court in the case of *State ex rel.* v. *Kansas Natural Gas Company*, 111 Kan. 809, is in error, and that the Public Utilities Commission of that state was and is without power under the Constitution of the United States to regulate the rates to be charged by Kansas Natural for the sale of gas to local distributing companies.

Points Advanced in Brief of Appellants.

The brief filed by appellants suggests nine points that should be considered by this court in connection with the review of this cause. While we think that the points in this case from the standpoint of appellee have been sufficiently presented, a brief answer to the points raised by appellants may aid the court.

The first point urged by appellants is that public welfare demands that the Kansas Natural be regulated.

The argument of appellants is one that might be properly presented to the Congress of the United States. This court is not concerned with what the law should be, but with what the law is.

As pointed out in our brief, there is no law in Missouri providing for the regulation or control of Kansas Natural, *supra*. The Supreme Court of Washington in the case of *State ex rel.* v. *Railroad Company*, 89 Wash. 599, 140 Pac. 591, in passing upon an argument similar to that advanced by the appellants in this cause, said:

> "Granting for the sake of argument that the right of the legislature to exercise the police power to the extent of regulating and controlling the price to be charged for power sold to private individuals or others, such right should not be declared by the courts in the absence of express legislation. The regulation and control of business of a private nature is sustained by reference to the police power, and even then it is sustained only when the courts have been able to say that the business is in character and extent of operation such that it touches the whole people and affects their general welfare. It is upon this principle that *Noble State Bank* v. *Haskell*, 219 U. S. 104, 31 Sup. Ct. 186, 55 L. Ed. 112, 32 L. R. A. (N. S.) 1062, Am. Cas. 1912-A 487; and *German Alliance Company* v. *Kansas*, 233 U. S. 389, 34 Sup. Ct. 612, 58 L. Ed. 111, L. R. A. 1915-C 1189, rest.
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> *"Until the legislature brings a business within the police power by clear intent, courts will not do so. Courts have assumed to say whether an act of the legislature falls within the police power, but primarily, the assertion of police power is for the legislature.* They are not disposed to hold that a thing should be done by an individual or by the whole public. They have acted only after the legis-

lature has defined the object of the power. In other words, the courts have never said primarily that the police power should be applied in any given case. Their only inquiry has been whether the legislative act has been reasonably within the legislative power, and the thing sought to be done is fairly within the terms of the act. And it is well that this is so, for the legislative body can extend the demand of police power with sufficient rapidity. There is no reason why the court should engage in a rivalry with it." (Italics ours.)

Appellants' statement of facts under the first point in their brief is not correct, and their conclusions and deductions sought to be made from the evidence are erroneously drawn. Appellants state that the rates and charges of Kansas Natural have always been "restricted or regulated." Appellants state that such rates and charges were "restricted or regulated" from 1906 to October, 1912, by the supply contracts and city ordinances referred to therein and attached thereto. This court in the case of *Public Utilities Commission* v. *Landon*, 249 U. S. 236, specifically held that the supply contracts and city franchises did not "restrict or regulate" the rates of the Kansas Natural, and because the United States District Court for the District of Kansas had erroneously held that Kansas Natural's rates were "restricted and regulated" by such city ordinances and contracts, the decision of the court below was reversed.

Appellants state that from October, 1912, to August, 1917, said contracts and ordinance rates were continued in effect by administrative orders of court. This statement is correct, but in view of the fact that

neither such supply contracts or city ordinances were a "restriction or regulation" of the rates of Kansas Natural in the sense that such terms apply to public utility rates, the continuation of the rates provided therein by court order were neither a "restriction nor regulation."

Appellants state that from August, 1917, to November, 1918, the rates and charges of Kansas Natural "have been restricted or regulated under the administrative order of the United States District Court, in which the supply companies' rate was fixed at a certain percentage of the distributor's selling rates, fixed by the court." The regulation of public utility rates is a legislative function, and the very fact that the court administering the property, affairs and business of Kansas Natural should by order of court fix the rates of Kansas Natural is, of course, conclusive that the rates prescribed by the court were not a "restriction or regulation" of rates in the sense in which the term "restriction or regulation" is applied in a public utility rate case.

Appellants urge that from November, 1918, to July, 1919, rates of the Kansas Natural were fixed by administrative orders of the court in the same manner as described in the next preceding paragraph. What is said in the next preceding paragraph applies with equal force here.

It is also stated that from July 14, 1919, to July 1, 1920, under the further administrative orders of the court, rates of Kansas Natural were fixed and restricted upon a flat rate basis of twenty-five cents per thousand cubic feet in southern Kansas, and thirty-five cents per

thousand cubic feet at Kansas City. What was said in the next two preceding paragraphs, apply with equal force to this paragraph.

Appellants also state that the rates of Kansas Natural were "restricted or regulated" from July 1, 1920, to April 29, 1922, by the order of the Commission, which is shown in the transcript at page 88. It appears from the order referred to (Trans. 82-88) that the Kansas City Company made application to the Commission for authority to increase its rates to consumers; that Kansas City Company's application for authority to increase its rates was based upon an order of the United States District Court increasing rates to be charged by Kansas Natural to Kansas City Company to thirty-five cents per thousand cubic feet. *The Kansas Natural was not a party to the proceeding before the Commission. The Kansas Natural did not file a schedule of rates with the Commission, nor ask authority from the Commission to increase its rates.* The order made by the Commission authorized the Kansas City Company to increase its rates to its consumers, and purported to authorize the Kansas City Company to pay to Kansas Natural the rates fixed not by the Commission, but by the United States District Court. The Act is very clear with respect to the procedure which must be pursued by a public utility in order to obtain authority to increase its rates. The utility, and not one of its customers, must file a schedule of rates with the Commission; the Commission may suspend such rates, and conduct a hearing and inquiry. The statement made by appellants that the rates of Kan-

sas Natural were "restricted or regulated" by the order of the Commission is without foundation in law or in fact.

It is also stated in appellants' brief (page 24) that the rates and charges of Kansas Natural have been "restricted or regulated" by the Public Utilities Commission of Kansas, and in proof of this statement, appellants refer to nothing contained in the record in this cause, but offer as proof a statement found in the case of *State ex rel.* v. *Gas Company*, 111 Kan. 810. If appellants are seeking to establish a fact, they should have introduced evidence of that fact in the record in a regular and orderly way. However, it appears from the decision of the Supreme Court of Kansas that the Kansas Natural rate referred to was authorized by an order of the District Court and approved by the Public Utilities Commission of Kansas. The order of the Public Utilities Commission is not in the record. The Supreme Court of Kansas says the rate was as fixed by the order of the federal court, and approved by the Commission, so we may assume that the action of the Kansas Commission was in general along the line of that taken by the Missouri Commission. We are not concerned in this case with what was done before the Kansas Commission, and, of course, we are not concerned in this case with evidence that is not in the record.

In appellants' brief on pages 28, 29 and 30, there is listed a number of cases (many of them being repeated under the names of various co-plaintiffs or co-defendants). These cases are listed under a statement that

"the following long list of cases regulatory in their nature in which Kansas Natural has directly or indirectly been involved, and in which the states of Kansas and Missouri, other Commissions and cites have been seeking in some manner to control said supply company, evidence a pressing need for regulation." An examination of these cases discloses that a majority of them were cases which were not "regulatory in their nature" and did not involve an attempt upon the part of either state, either commission, or any city to control or regulate the rates or services of Kansas Natural.

The case of *Kansas* v. *Flannelly*, 96 Kan. 372, is hereinbefore referred to in this brief (p. . .).

The case of *McKinney* v. *Kansas Natural Gas Company*, 206 Fed. 772, which is also listed in the cases as "*Fidelity Title & Trust Co.* v. *Kansas Natural*," deals with an application of the receivers of Kansas Natural appointed by the State Court to require receivers appointed by the Federal Court to surrender possession of the property in their custody to the applicants. There is in the case no question of state or federal control of gas rates, gas service, or gas business.

The case of *McKinney* v. *Landon*, 209 Fed. 300, which is also referred to in the list of cases under the title of "*Fidelity Title & Trust Co.* v. *Landon*," is the decision of the Circuit Court of Appeals of the Eighth Circuit affirming the decision of the district court in the case referred to in the next preceding paragraph. There is in the case no question of state or federal control of gas rates, service or business.

The case of *Landon* v. *Kansas Natural Gas Company*, 217 Fed. 187, which is also referred to in the list of cases under the title of "*Landon* v. *McPherson District Judge*," deals only with the question concerning the receivership of the Kansas Natural in the federal court, and there is not even the remotest reference in the case to the regulation of the affairs of Kansas Natural Gas Company, its rates or service.

The case of *Fidelity Trust Company* v. *Kansas Natural*, 219 Fed. 614, which is also referred to in the list under the title of "*McKinney* v. *Kansas Natural*," held that the receivers of Kansas Natural were not required to comply with an order of the Public Utilities Commission of Kansas, because the order sought to be imposed was "an undoubted regulation of this (interstate) commerce, direct in its nature, and thus beyond the scope of state action."

The case of *State of Kansas ex rel.* v. *Wyandotte County Gas Company*, 88 Kan. 165, was a controversy between the Public Utilities Commission of Kansas, and the Wyandotte County Gas Company, a local gas distributing company in Kansas City, Kansas, and Rosedale, Kansas, and involved one question, and that was the right of the Wyandotte County Gas Company to increase its rates in accordance with the terms of the franchise granted by Kansas City. Kansas Natural was not a party to the cause. The decision in the case did not, directly or indirectly, turn upon any question concerning the power of the Commission or the state to regulate Kansas Natural.

The case of *Wyandotte County Gas Company* v. *State of Kansas*, 231 U. S. 622, is the decision of this court affirming the Supreme Court of Kansas in the case referred to in the next preceding paragraph.

The case of *State ex rel.* v. *Litchfield*, 97 Kan. 592, 155 Pac. 814, is a case in which the Supreme Court of Kansas did hold that the Kansas Natural was subject to regulation as to rates at Olathe, Kansas, because of the so-called supply contracts. The decision of the Supreme Court of Kansas held that because of the contracts, the local company was the mere agent of Kansas Natural, and, therefore, Kansas Natural was subject to regulation by the Commission. There are two answers to the holding of the Supreme Court of Kansas. In the first place, the supply contracts are no longer effective; their enforcement has been enjoined. (Trans. 77-80.) The Olathe Company, as well as the Kansas Commission, were enjoined from enforcing the contracts which were the subject of adjudication in the case of *State ex rel.* v. *Litchfield, supra*, by the decree of Judge Booth. (Trans. 73-81.)

The second and more conclusive answer to the case of *State ex rel.* v. *Litchfield, supra*, is that this court in the case of *Public Utilities Commission* v. *Landon*, 249 U. S. 236, in reversing the District Court, construed these identical contracts, saying: "But we cannot agree with its (the District Court's) conclusion that local companies in selling gas to their customers acted as the mere agents, immediate representatives or instrumentalities of the receivers."

The case of *State ex rel.* v. *Gas Company,* 100 Kan. 593, 165 Pac. 1111, is discussed at other parts of this brief. (See page ...)

The case of *St. Joseph Gas Co.* v. *Barker, Attorney-General,* 243 Fed. 206, involved a controversy between the distributing company at St. Joseph, Missouri, and the Public Service Commission of Missouri, over the matter of rates. Kansas Natural was not a party to the cause.

The case of *Landon* v. *Commission,* 234 Fed. 152, did involve, in part, a review of attempted regulations of Kansas Natural. The Commission was enjoined from enforcing its orders.

The case of *Landon* v. *Public Utilities Commission,* 242 Fed. 658, is a direct adjudication by the District Court that rates fixed for Kansas Natural by the provisions of the laws of Kansas were non-compensatory and unreasonably low. But this court, in an appeal from that decision, in the case of *Commission* v. *Landon,* 249 U. S. 236, reversed such parts of the case below as held that either the law or the commission had attempted to fix the rates of Kansas Natural.

The case of *Landon* v. *Public Service Commission,* 245 Fed. 950, holds that the business conducted by Kansas Natural is interstate commerce and that, therefore, it is free from regulation by the states.

The decision of this court in *Commission* v. *Landon,* 249 U. S. 236, is referred to and listed as though it were three separate and distinct cases. Its holding has been referred to herein.

The case of *Landon* v. *Court of Industrial Relations,* 269 Fed. 411, is a decision of the United States

District Court in the Kansas Natural receivership case, after the decision of this court in the case of *Commission* v. *Landon*, 249 U. S. 236, in which the District Court carried out the instructions of this court and heard certain issues only as between the distributing companies and the states.

The case of *Landon* v. *Court of Industrial Relations*, 269 Fed. 423, is a decision that to some extent turned upon the question of regulation of Kansas Natural by the Kansas Commission.

The case of *Landon* v. *Court of Industrial Relations*, 269 Fed. 433, involved only a review of orders affecting rates of distributing companies.

The case listed as "*State of Missouri* v. *Kansas Natural*, 282 Fed. 341," is the decision of Judge Van Valkenburgh in the case at bar.

The case of *State of Missouri, ex rel.* v. *Kansas Natural*, No. 155 October, 1923, Term, United States Supreme Court, is this case.

The case of *Kansas* v. *Gas Company*, 111 Kan. 809, 208 Pac. 622, is the decision of the Supreme Court of Kansas hereinbefore referred to and discussed. (See page ——.)

The case listed as "*Kansas Natural Gas Company* v. *Kansas*, No. 133, October, 1923, Term, United States Supreme Court," is the case pending herein on appeal from the decision of the Supreme Court of Kansas in the case referred to in the next preceding paragraph.

The case listed as *Central Trust Co.* v. *Consumers Light, Heat & Power Company*, 282 Fed. 680, is a de-

cision of Judge Pollock presiding in the United States District Court for the District of Kansas, holding that Kansas Natural Gas Company was not subject to regulation as to its rates, for the reason that it is engaged in interstate commerce.

The case listed as "*State of Kansas* v. *Central Trust Co.*, No. 137, October, 1923, Term, United States Supreme Court," is an appeal from the decision referred to in the next preceding paragraph.

Commencing at page 31 of their brief, appellants discuss the proposition that Kansas Natural is a public utility at common law. There are several alleged statements of fact or conclusions drawn from the evidence contained in this subdivision of the brief that we desire to sharply challenge.

On page 35, appellants state that Kansas Natural offers to serve all consumers and distributing companies on and along its lines who apply for service, at a uniform, regular and published schedule of rates, without negotiation, agreement or private contract.

We are amazed at such a statement. Appellants are not justified from any evidence or admission in pleading to draw such a conclusion. From other parts of the brief, it appears that this conclusion is sought to be drawn from the notice sent by John M. Landon as Receiver of Kansas Natural under date of July 14, 1919. (Trans. 70.) This is a notice that informed all distributing companies supplying natural gas to the cities named in the notice that from and after a date fixed in the notice, the price of gas would be as stated in said

notice. It appears from the record that there actually was a distributing company in each of the cities listed in the notice that was receiving gas from Kansas Natural and distributing such gas in each of the cities listed. (Trans. 73-81.) The notice given is a short, compact, complete and comprehensive notice that was delivered to each and all of the distributing companies that were taking their gas from Kansas Natural. It is surprising that appellants would argue that because of this notice Kansas Natural had offered to serve "all consumers and distributing companies on and along its lines who applied for service, at a uniform, regular and published schedule of rates, without negotiation, agreement or private contract." The facts are that Kansas Natural never had and does not now make any such offer, and the statement is without the slightest support in fact. The notice only applied to distributing companies already connected with Kansas Natural and it does not apply to consumers at all.

Appellants in their brief at page 37, state that Kansas Natural has the power of eminent domain, and, remarkable to state, in this, a case which involves the construction of Missouri laws, they cite in support of their statement a Kansas statute, and do not cite or refer to any statute of Missouri which would confer the power of eminent domain upon Kansas Natural in that State. We have argued in our brief that Kansas Natural does not have the power of eminent domain under the laws of Missouri. (*Supra*, p——.)

At the top of page 38, appellants state that Kansas Natural has no contract as to rates with any of the distributing companies, for the reason that the original contracts have been annulled as to rates by decree of court at the suit of Kansas Natural, and no other written contracts have been made between Kansas Natural and the distributing companies. This is a startling statement, in view of the record in the case.

It appears from the evidence, (Trans. 38-39) that from October 12, 1912, to August 13, 1917, the receivers of Kansas Natural furnished gas to the distributing companies under the orders of court, which did not specifically adopt the said supply contracts. Clearly, the distributing companies were receiving and paying for gas during this period pursuant to a contract in writing, because the receivers were furnishing the gas pursuant to an order of court, (and there being no disaffirmance of the old supply contracts) the contracts would prevail, and in fact they did prevail. It further appears from the stipulation that from August 13, 1917, to January 1, 1921, the Receivers of the Kansas Natural furnished gas pursuant to administrative orders of the United States District Court, copies of which are attached to the stipulation as Exhibits "A" to "E," inclusive. (Trans. 62-63.) Each of such exhibits specifically sets forth an order of court or the receivers fixing the rates to be charged by the receivers of Kansas Natural to each and every of the distributing companies supplied by it. Clearly, gas furnished pursuant to such orders was sold pursuant to a written contract that

was binding upon the receivers of the Kansas Natural as well as distributing companies when they received such gas. The statement of appellants that there is no contract as to rates between Kansas Natural and the various distributing companies as made in their brief on page 38, is all the more startling when we examine appellants' brief at page 90. At the latter page, appellants state that when the receiver of Kansas Natural on July 14, 1919, issued his notice fixing the price of gas to be charged the various distributing companies, the Kansas City Company and other distributing companies, relying upon said offer to furnish gas and to sell gas at such price, did thereupon pay the price fixed in said notice, and have continuously thereafter so paid the price, and are willing, ready and able to continue to do so, and that, therefore, *"a contract arises"* (italics are appellants), not only implied, but expressed, to continue to furnish said gas at such price until changed by agreement or failing in such agreement, until such reasonable time after notice as would enable Kansas City Company to obtain a supply of gas elsewhere.

On page 38 of Appellants' brief, they state that Kansas Natural undertook by contracts to perform the public service of furnishing and supplying natural gas required by city ordinance. They refer in support of their conclusion of fact to the supply contract between predecessors of Kansas Natural and predecessors of the Kansas City Company. Our answer to appellants' conclusion is: First: The supply contracts referred to are no longer operative. They have been

decreed to be void by the decision of Judge Booth in the receivership case. (Trans. 73-71.) Second: The decision of this court in the case of *Commission* v. *Landon*, 249 U. S. 236, construed these contracts as not fixing a public obligation upon Kansas Natural. The remaining matter found on page 38 of the brief is all concerned with the construction of the supply contracts, which, of course, are no longer operative, no matter what those contracts might have been originally construed to be.

On page 39 appellants in their brief state that Kansas Natural employs licensed agencies of the State, to-wit:—public utilities, to sell and market its product. In the next paragraph, it concludes by reference to the record of the Landon Case, No. 330 in the October, 1918, Term of this Court (which record, incidentally, is no part of the record in this case that Kansas Natural in 1915 filed application with the Public Utilities Commission of Kansas to fix rates for the distributing companies it served *on the unwarranted assumption that they (distributing companies) were its (Kansas Natural's) mere agents*, and had no voice in the rates charged consumers. If Kansas Natural was unwarranted in assuming that the distributing companies were its mere agents in 1915, how are appellants warranted in assuming that the distributing companies are now the agents of Kansas Natural?

Again, on page 39 of their brief, appellants state that Kansas Natural filed its own schedule of rates, rules and regulations with the Commission in 1913, as provided by the Act, and in support of this statement,

they refer to the record. (Trans. 109-111.) An examination of the record with respect to this schedule discloses that the rates referred to apply only to Jasper County, outside of the limits of incorporated cities, and along the 16-inch line through Platt and Buchanan counties, from the Missouri River to the city limits of St. Joseph; that is to say, the rates referred to in the schedule are for the consumers supplied direct in the Joplin, Missouri, mining district, and to main line consumers north of Kansas City. The rates referred to in the schedule are not in controversy in this cause, and have nothing whatever to do with the rates to be charged by Kansas Natural to any distributing company.

Commencing at page 39 and continuing through to page 41, appellants argue that the notice found in the record at page 72, which is similar, if not identical, with the notice on page 70, constitutes a general and unrestricted offer to serve all who apply for gas, and appellants refer to it as a "formal public notice and schedule." There is not the slightest reason to construe this notice to distributing companies actually taking gas from Kansas Natural Gas Company as an offer to serve all who should apply. We do not know what appellants mean by the statement that this is a "formal published notice and schedule." It is not a schedule of rates filed with any regulatory body. It was a notice sent only to the distributing companies actually receiving gas from the Kansas Natural, and bore the approval of the judge who was administering

the property. Clearly, such a notice does not charge defendant and its property with the public duty of furnishing gas to all who may demand it. Kansas Natural is under no such duty or obligation.

The third point sought to be made by appellants is that Kansas Natural is declared by statutes to be a public utility. Appellants cite a Kansas statute upon this point. Of course, as far as this case is concerned, Kansas Natural must be a public utility within the Missouri statutes. Our arguments upon this point are advanced heretofore, pages .... to .....

The fourth point sought to be made by appellants is stated to be that interstate commerce in natural gas is local in its nature; is peculiarly of local concern; makes provision for local needs; pertains to local public service, and is subject to reasonable state regulation. All of these points are argued by us in other parts of this brief.

In addition to the cases that we refer to as sustaining our theory, to-wit: that the State of Missouri may not prescribe or regulate the rates to be charged by Kansas Natural to local distributing companies, appellants in their brief refer to the case of *Commission* v. *Power Company*, 282 Fed. 837, and *Coal Company* v. *Commission*, 7 A. L. R. 1081, 100 Southeastern, 557. Considering these two cases in the reverse order, we find that in the case of *Coal Company* v. *Commission, supra*, the Supreme Court of Appeals of West Virginia held that an electric power company which was generating electric power in the State of

Virginia and then transporting such power into the State of West Virginia, where such power was sold directly to the consumer in West Virginia, was subject to regulation as to the rates charged by it by the Public Service Commission of West Virginia. The case of *Coal Company* v. *Commission, supra*, is, in our judgment in its essence identical with the case of *Pennsylvania Gas Company* v. *Commission, supra.*

In the case of *Commission* v. *Power Company*, 282 Fed. 837, the defendant, the Southern Power Company was operating a hydro-electric plant, from which it was furnishing electrical energy to certain power companies. The Circuit Court of Appeals held "by the laws of North Carolina, hydro-electric companies are declared to be public service corporations, subject to the laws of the State regulating public service corporations, and under the control of the Corporation Commission." The Southern Power Company had exercised the power of eminent domain, which, the court held, could only have been conferred upon companies engaged in public service. The Circuit Court of Appeals also said that the people of North Carolina had in very comprehensive terms explicitly provided for control and regulation of just this character of companies. The court also pointed out that the statute authorizing the commission to control rates and service of electric power companies did not limit that control to rates charged to the consumers only. There is nothing in the laws of North

Carolina limiting the power of the Commission to the regulation of rates for light, heat or power.

The case of *Commission* v. *Power Company, supra*, does not control the case at bar. The case of *State* v. *Commission*, 275 Mo. 496, *supra* .... comes much nearer to be identical with the present case. In the North Carolina case it was established (a) the laws of the state provided expressly for the control of the companies in the very class to which the defendant belonged, and (b) the company that was sought to be controlled had accepted the right conferred by law to exercise the power of eminent domain, thereby admitting (or at least being estopped from denying) that its business was "public." In other words, the North Carolina case was one in which "public profession" arose from "comprehensive terms explicitly provided by law," and from the conduct of the party that was being controlled. In the present case, the Act does not provide for the regulation of the business that is being done, but, on the contrary, by necessary implication, it expressly excludes the character of business being done. The North Carolina case and the case at bar are not similar, because of the dissimilarity in the statutes of Missouri and the statutes of North Carolina. The decision of the Supreme Court of Missouri in construing the Missouri Act, is the controlling factor in the case.

The fifth point sought to be made by appellants is that the specific exclusion of interstate commerce in natural gas from the Act of Congress regulating

interstate commerce implies and authorizes regulation by the state of interstate commerce in natural gas until Congress acts. That portion of our brief in which we discuss the power of the state over interstate commerce answers this contention. This provision of the Act of Congress may authorize indirect regulation or incidental regulation affecting transportation in interstate commerce, but under the principles of the Minnesota Rate Cases, it cannot authorize the states to make direct regulations of interstate commerce, because such regulations would be in violation of the Constitution of the United States. This court upon several occasions had held that the states are without power to make regulations directly affecting interstate commerce in natural gas. The latest decision of this court upon the point (and the decision was rendered long after the passage of the Act of Congress referred to) is that of *Pennsylvania* v. *West Virginia*, ... U. S. ....., 67 L. ed. 762, *supra*.

The sixth point sought to be established by appellants' brief is that a corporation employing a licensed agency of the state, a public utility, to sell and market products shipped interstate, thereby consents to reasonable state regulation. The argument upon this point opens with the statement that Kansas Natural in the last analysis is not primarily engaged in interstate commerce at all. Appellants averred that the business of defendant is interstate commerce, (Trans. 7) and this court in the cases which have been heretofore cited, *supra*, p. ....., has found it engaged in interstate com-

merce. Appellants state on page 68 that the general body of the public at large is not Kansas Natural's customers. This statement is true. The Kansas Natural supplies gas only to the distributing companies; but it does not supply gas to the distributing companies as agents in any sense. The sale of gas by Kansas Natural to the local distributing companies is a complete sale at the point of delivery, and the interstate movement ceases with delivery. The local distributing companies, in the sale of their gas to the local consumers were held not to be the agents of Kansas Natural by this Court in *Public Utilities Commission* v. *Landon*, 249 U. S. 236, and the decision in the Landon case, of course, was based upon the status of the properties when the supply contracts were effective. Clearly, if they were not under the supply contracts, they are not now. Appellants cite the famous case of *Brown* v. *Maryland*, 12 Wheat. 419, as being in point. That case fits the situation that is here presented, but not as contended by appellants. In the case of *Brown* v. *Maryland*, the Supreme Court declared a law of Maryland restricting the right of an importer to sell his goods unconstitutional. Chief Justice Marshall in outlining the principle of the so-called "original package rule," said that if an importer would break the original package of imports, the property would then become subject to state regulation, or if the importer should use a state agency as for example a licensed auctioneer for the sale of his goods, he could not object to paying the auctioneer's fees. But

in the case at bar, Kansas Natural is not employing the local distributing companies as factors, or agents, to sell its product to consumers; the sale is outright and complete, and not on consignment, and when the product passes to the consumer, the distributing company is a principal in the sale and not a mere agent.

The seventh point in appellants' brief, page 73, is with respect to the construction of the case of *Public Utilities Commission* v. *Landon*. That case is already fully discussed in our brief, and nothing further need be said by us on this point.

The eighth point in the brief, page 81, is stated to be that a public utility or one conducting a business affected with a public interest may not arbitrarily discontinue service for the non-payment of a controverted bill, and that an injunction will issue to prevent such wrongful act. But it is also a well-established principle of equity that when it once takes jurisdiction, it will hear the entire cause. This point assumes that Kansas Natural is a public utility, and that it was seeking to arbitrarily discontinue the supply of gas on account of the non-payment of a controverted bill. We think that we have successfully shown that Kansas Natural is not a "gas corporation" within the meaning of the Missouri public utilities act, and therefore it is not a public utility; therefore, its rates are not subject to regulation by the Commission, which was the point presented in the court below.

This case does not in its primary aspect, present a private dispute between a public utility and one of its

customers. The State of Missouri and the Commission acting pursuant to the power assumed to be vested in them by law, by the bill of complaint, sought to assert their sovereign right of compelling Kansas Natural to comply with the laws of Missouri, in this, to-wit: not charging any consumer or distributing company any rate not authorized by the Commission under the Act or from discontinuing service on account of the non-payment of any bill not authorized by the Commission. Appellants (State, Commission and Kansas City Company) in their brief state their position thus: *"This action is maintained for the purpose of requiring the supply company (Kansas Natural) to file its rates with the Commission as provided by law."* There was presented to the court below the question, "Is Kansas Natural required to file its rates with the Commission?" and having determined the inquiry presented in the negative, the court properly dismissed the bill.

The two Missouri cases cited by appellants do not sustain appellants' contentions. The case of *Randolph* v. *Gas Company*, 250 S. W. 642, was a case in which a gas company cut off service where there was a dispute as to the amount of gas consumed. The user of the gas sought a mandatory injunction to compel the company to restore service. The court inquired into the merits of the dispute, to-wit: the amount of gas actually consumed, and found the issues in favor of the consumer. The case of *State ex rel Kenlock Telephone Co.*, 93 Mo. App. l. c. 363, 67 S. W. 684, was an action in mandamus to compel the installation

of a new service where it was refused for the reason that the proposed customer had failed to pay bills due the company for prior service. The facts were all found in favor of the user and the writ issued. In the Gas Company case (250 S. W. 646) the Kansas City Court of Appeals referred to the decision of the St. Louis Court of Appeals in *McDanield* v. *Waterwork Company*, 48 Mo. App. 273, in which there was presented a dispute between a waterworks company and a consumer over a bill. The waterworks company was about to shut off the water, when the consumer sought injunctive relief, but upon hearing the injunction was dissolved. The court in its opinion said:

> "We do not take the view, pressed upon us by counsel for the plaintiffs, that, if the plaintiffs do not see fit to pay this excessive charge, the only remedy of the defendants is an action at law to recover the same. The slightest reflection will show that a water company could not do business if its only remedy for the waste of its water by its customers consisted in actions at law against them severally. This would lead to an almost infinity of actions to collect very small bills against scattered consumers, many of them mere renters and insolvent."

In all of the above Missouri cases, the decisions are based upon rules established by the utility regulating the discontinuance of service. Of course, no rule with respect to the discontinuance of service is pleaded in the case at bar, except only the rules established by the Act which requires that rates shall be changed only in accordance with the Act. The court below found the statutory rule did not apply to the business of Kansas

Natural, so that Kansas Natural was not violating or about to violate any rule which it was required to observe when it advised its customers that it would only furnish gas upon the payment of increased rates.

On page 84 appellants cite certain cases as sustaining their contention that Kansas Natural may not discontinue service on account of a disputed bill, but is required to continue service and sue at law to recover the amount of its bill. In the case of *Foster* v. *Monroe*, 82 N. Y. Sup. 83, 40 Mis. Rep. 449, in the opening words of the opinion, it is held as follows:

> "Pending this action to ascertain the proper amount due, plaintiffs ask to have the defendant enjoined from cutting off the water supply to their premises."

This case certainly contemplated that "equity" and not "law" was to determine the correctness of the bill.

Another case cited is *Simms* v. *Water Company*, 87 So. 688, 205 Ala. 378, in which the Supreme Court of Alabama announces the rule:

> "The weight of authority seems to hold that, in case of a ***bona fide*** dispute as to the amount demandable for water supplied, or to be supplied under reasonable regulations requiring payment in advance, the consumers' recourse, if put to it, in order to save his supply of water pending a settlement of the dispute, is to pay the amount demanded, and sue for its recovery, if unjust, in law and fact, or to invoke the equity jurisdiction of the court to the end that the water company may be enjoined pending a judicial determination of the matter in dispute, offering to pay the sum the court may ascertain to be due."

The case of *Waterworks Company* v. *Davis*, 77 So. 927, 16 Ala. App. 333, cited by appellants, is an action for damages on account of the wrongful discontinuance of water service, and it does not hold, as contended by appellants.

The case of *Burrough of Washington* v. *Water Company*, 62 Atl. 390, 70 N. J. Eq. 254, cited by appellants, recognizes that the court of equity, where relief is sought, in the case of disputed public utility bills shall determine the correct rate to be charged.

The case of *Dodd* v. *Atlanta*, 154 Ga. 33, 113 S. E. 166, cited by appellants, holds that a court of equity should enjoin a public utility from discontinuing service to a consumer when it appears that there is a real dispute as to the amount due from the consumer to the utility and the consumer in his bill has expressed a willingness to pay the amount which the court should determine to be due.

The cases of *Hatch* v. *Consumers Co.*, 17 Idaho, 204, 104 Pac. 670, and *Pool* v. *Water Company*, 81 So. Car. 438, 62 S. E. 874, cited by appellants, were actions in mandamus wherein the courts reviewed certain rules of public utilities that were asserted to be unreasonable. In neither case did the courts announce any such rule as that contended for by appellants.

Equity did interfere in this cause for the very purpose of determining the issue raised by the pleadings of the complainants. That is, the court determined that Kansas Natural was not required to file its rates with the Commission. This cause was not dismissed below

because of any holding by the court that appellants did not have the right to resort to equity. That which was done by the court below was consistent with the ruling in every case cited by appellants.

Commencing at page 81, and continuing to page 82, appellants refer to cases which establish the principle that a public utility which is not subject to regulation by an agency of the state or national government, may not, therefore, charge unreasonable rates. Our observation with reference to this proposition is that the point is not in the case. Appellants offered no evidence establishing or tending to establish that the rate proposed to be charged by Kansas Natural was unreasonable.

The ninth point in the case is stated to be that if Kansas Natural's rates are not subject to regulation, it is bound by contract, express or implied, to continue service until after notice a substitute can be provided; and second, such rates can be agreed upon. Under this point, and at page 90, appellants make the statement that when the supply company (meaning thereby John M. Landon as Receiver for Kansas Natural Gas Company) on July 14, 1919, issued a notice to the distributing companies supplying natural gas to all of the cities named in the notice that after the meter reading in August, 1919, the price of gas would be thirty-five cents per thousand cubic feet, that the supply company thereby entered into an agreement either by implication or expressly, that it would continue to supply gas at the rate of thirty-five cents per thousand cubic feet until that rate was changed by agreement, or if an agreement

could not be reached, then until such reasonable time after notice was given to enable the Kansas City Gas Company to make other provisions for a supply of gas to meet the demands of its customers.

There are two answers that readily suggest themselves to the above observations of the appellants. These answers are, first: The question of a contract arising out of the notice of July 14, 1919, is not asserted by the pleadings, and therefore is not in the case. Neither the bill of complaint nor the intervening bill of the Kansas City Company refer to any such purported contract. The only reference to a contract in the bill of complaint or intervening bill deals with the so-called supply contracts of November 17 and December 3, 1906. These so-called supply contracts were by decree of the United States District Court entered on the 24th day of December, 1920, held to be no longer operative or binding upon Kansas Natural, and the appellants in this cause were permanently enjoined from enforcing or seeking to enforce the same. (See this brief, page ...)

But another insuperable objection to the above contention made by the appellants is that the notice itself expressly discloses that the price therein fixed was not to continue until changed by agreement, or if an agreement for a changed price could not be made, until such reasonable time as would enable Kansas City Gas Company to arrange for a supply of gas elsewhere, because the notice, which is addressed to all distributing companies supplying natural gas to all of the cities named, is to the effect "that from and after the average meter

reading date in August, 1919, and until further notice," the rates therein specified will be charged.

Furthermore, it appears from the transcript of the record (pages 71, 72) that by the order of Judge Booth on the 13th day of October, 1919, the very schedule of rates which is referred to as forming the basis of the contract, was temporarily suspended, and that the so-called thirty-five cent rate became effective not with the meter readings of August, 1919, but on and after March 25, 1920. (Trans. 72.)

It also is apparent from the notice given by the managing receiver of the Kansas Natural Gas Company that the rates prescribed by the order of January 20, 1920 (Trans. 72), were to be effective only "until further notice."

Conclusion.

The only business done by Kansas Natural in the State of Missouri is the completion of the transportation of gas in interstate commerce by the sale and delivery of such gas to purchasers who are public utilities using such gas for re-sale to consumers thereof. Kansas Natural transacts no business of a local nature in the State of Missouri. The only business of Kansas Natural in the State of Missouri is interstate commerce. Kansas Natural is not subject to regulation by the State of Missouri through the commission with respect to the rates to be charged by it to distributing com-

panies, for the reason that the business being transacted by Kansas Natural is interstate commerce and Kansas Natural is not a "gas corporation" within the meaning of the Act.

Judge Van Valkenburgh, before whom this case was tried, delivered a very able opinion in which he came to the conclusion that the bill of complaint should be dismissed. This opinion is found in the transcript at pages 123 to 131, inclusive, and is, therefore, not reproduced herein.

Wherefore, for the reasons herein stated, appellee submits that the decision of the court below should be affirmed.

Respectfully submitted,

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APPENDIX.

Statutes of Missouri Referred to in Pleadings and Brief.

There is involved in this cause, the following sections of the Act:

Subdivisions 10 and 11 of Section 10411, Revised Statutes of Missouri, 1919, which defines the term "gas plant" and "gas corporation," and Sections 10477, 10478 and 10479 of the Revised Statutes of Missouri, 1919, which requires "gas corporations" to obtain the consent of the Commission before changing rates. It is admitted by the pleadings that Kansas Natural has not complied with Sections 10477, 10478 and 10479.

The portions of the foregoing sections of the Act which it may be necessary to examine, are as follows:

Subdivision 10 of Section 10411 is as follows:

> "The term 'gas plant' when used in this chapter, includes all real estate, fixtures and personal property owned, operated, controlled, used or to be used for or in connection with or to facilitate the manufacture, distribution, sale, or furnishing of gas (natural or manufactured) for light, heat or power."

Subdivision 11 of Section 10411, is as follows:

> "The term 'gas corporation' when used in this chapter, includes every corporation, company, association, joint stock company or association,

partnership and person, their lessees, trustees or receivers appointed by any court whatsoever, owning, operating, controlling or managing any gas plant operating for public use under privilege, license or franchise now or hereafter granted by the state or any political subdivision, county or municipality thereof."

Section 10477, in so far as applicable, is as follows:

"Every gas corporation * * * shall furnish and provide such service, instrumentalities and facilities as shall be safe and adequate, and in all respects just and reasonable. All charges made or demanded by any gas corporation * * * for gas, shall be just and reasonable and not more than allowed by law or by order or decision of the commission. Every unjust or unreasonable charge made or demanded for gas, or in excess of that allowed by law or by decision of the commission is prohibited.

"2. No gas corporation * * * shall directly or indirectly by any special rate, rebate, drawback, or other device or method charge, demand, collect or receive from any person or corporation a greater or less compensation for gas, except as authorized in this chapter than it charges, demands, collects or receives from any other person or corporation for doing a like or contemporaneous service with respect thereto under the same or similar circumstances or conditions.

"3. No gas corporation * * * shall make or grant any undue or unreasonable preference or advantage to any person, corporation or locality or to any particular description of service in any respect whatsoever, or subject any particular person, corporation, or locality or any particular description of service, to any undue or unreasonable advantage or prejudice in any respect whatsoever.

"4. Nothing in this section shall be taken to prohibit a gas corporation from establishing a sliding scale for a fixed period for the automatic adjustment of charges for gas. * * * Provided that the sliding scale shall first have been filed with and approved by the commission."

Section 10478 reads as follows:

"The Commission shall: 1. Have general supervision of all gas corporations, electric corporations and water corporations having authority under any special or general law, or under any charter or franchise to lay down, erect, or maintain wires, pipes, conduits, ducts or other fixtures in, over or under the streets, highways and public places of any municipality, for the purpose of furnishing or distributing water or gas or of furnishing or transmitting electricity for light, heat or power, or maintaining underground conduits or ducts for electrical conductors, and all gas plants, electric plants and water systems owned, leased or operated by any gas corporation, electrical corporation or water corporation.

"2. Investigate and ascertain from time to time the quality of gas supplied by persons, corporations and municipalities; examine or investigate the methods employed by such persons, corporations and municipalities in manufacturing, distributing and supplying gas for light, heat or power, and in transmitting the same, and have power to order such reasonable improvements as will best promote the public interests, preserve the public health, and protect those using such gas and those employed in the manufacture and distribution thereof, and have power to order reasonable improvements of extensions of the works, pipes, lines and other reasonable devices, apparatus and property of gas corporations.

"3. Have power by order to fix from time to time standards for the measurement for the purity or illuminating power of gas to be manufactured or sold by persons, corporations or municipalities for lighting, heating or power purposes * * * and by order to require gas so manufactured, distributed or sold to equal the standard so fixed by it, and to prescribe from time to time the reasonable minimum and maximum pressure at which gas shall be delivered by said persons, corporations or municipalities for the purpose of determining whether the gas manufactured, distributed or sold by such persons, corporations, or municipalities for lighting, heating or power purposes conforms to the standards of illuminating power, purity or pressure and conforms to the orders issued by the Commission, the Commission shall have power of its own motion to examine and investigate plants and methods employed in the manufacturing, delivering and supplying gas, and shall have access through its members or persons employed and authorized by it to make such investigation and examinations to all parts of the manufacturing plants owned, used or operated for the manufacture, transmission or distribution of gas. * * * Any employe or agent of the Commission who divulges any fact or information which may come to his knowledge during the course of any such inspection or examination, except in so far as he may be directed by the commission or by a court or judge thereof, or authorized by law, shall be guilty of a misdemeanor.

"4. Have power in its discretion to prescribe uniform methods of keeping accounts, records and books to be observed by gas corporations. * * * It may also in its discretion prescribe by order forms of accounts, methods and memorandum to be kept by such persons, corporations

or municipalities. Notice of alteration by the Commission in the required method or form of keeping the system of account shall be given to such persons, corporations by the Commission at least six months before the same shall take effect. Any other and additional forms of accounts, records, memorandums kept by said corporation shall be subject to examination by the Commission.

"5. Examine all persons, corporations and municipalities under its supervision and keep informed as to the methods, practices, regulations and property employed by them in the transaction of their business. Whenever the Commission shall be of the opinion after hearing had upon its own motion or upon complaint that the rates or charges or acts, or regulations of such person, corporations or municipalities are unjust, unreasonable, unjustly discriminatory or unduly preferential or in any wise in violation of any provision of law, the Commission shall determine and prescribe the just and reasonable rates and charges thereafter to be in force for the service to be furnished, notwithstanding a higher rate has been heretofore authorized by statute and the just and reasonable acts and regulation to be observed; and whenever the Commission shall be of the opinion after a hearing had upon its own motion or upon complaint that the property, equipment or appliances of any such person, corporation or municipality are unsafe, insufficient or inadequate, the Commission shall determine and prescribe the safe, efficient and adequate property, equipment and appliances thereafter to be used, maintained and operated for the security and accommodations of the public and in compliance with the provisions of law and of their franchises and charters.

"6. Require every person and corporation under its supervision and it shall be the duty of

every person and corporation to file with the Commission an annual report verified by the oath of the president, treasurer and general manager or receiver, if any thereof * * * the report shall show in detail (a) the amount of its authorized capital stock and the amount thereof issued and outstanding; (b) the amount of its authorized bonded indebtedness and the amount of its bonds and other forms of evidence of indebtedness issued and outstanding; (c) its receipts and expenditures during the preceding year; (d) the amount paid for dividends upon its stock and interest upon its bonds; (e) the names of its officers and the aggregate amount paid as salaries to them, and the amount paid as wages to its employees; (f) the location or locations of its plant and system, with a full description of its property and franchises, stating in detail how each franchise said to be owned was acquired; and (g) such other facts pertaining to the operation and maintenance of the plant and system and affairs of the corporation or system as may be required by the Commission. * * *"

(Paragraph 7 deals with reports from municipally operated plants.)

"8. Have power through its members or inspectors or other employees duly authorized by it to enter in and upon and inspect the property, building, power houses, ducts, conduits, and offices of any of such corporations, persons or municipalities.

"9. Have power to examine the accounts, books, contracts, records, documents and papers of any such corporation, person or municipality and have power, after hearing, to prescribe by order the accounts in which particular outlays and receipts shall be entered, charged or credited.

"10. Have power to compel, by *subpoena duces tecum*, the production of any accounts,

books, contracts, records, documents, memoranda and papers. In lieu of requiring production of originals by *subpoena duces tecum* the Commission or any commissioner may require sworn copies of any such books, records, contracts, documents and papers, or parts thereof, to be filed with it. The Commission may require of all such corporations, persons, or municipalities specific answers to questions upon which the Commission may need information, and may also require such corporations, persons or municipalities to file periodic reports in the form covering the period and filed at the time prescribed by the Commission. If such corporation, person or municipality shall fail to make specific answer to any question or shall fail to make a periodic report when required by the Commission as herein provided within the time and in the form prescribed by the Commission for the making and filing of any such report or answer, such corporation, person or officer of the municipality shall forfeit to the state the sum of one hundred dollars for each and every day it shall continue to be in default with respect to such report or answer. Such forfeiture shall be recovered in an action brought by the Commission in the name of the State of Missouri. The amount recovered in any such action shall be paid to the public school fund of the state.

"11. Have power in all parts of the state, either as a commission or through its members, to subpoena witnesses, take testimony and administer oaths to witnesses in any proceeding or examination instituted before it, or conducted by it in reference to any matter under this article.

"12. Have power to require every gas corporation to file with the Commission and to print and keep open to the public inspection schedules showing all rates and charges made, established or enforced or to be charged or enforced; all

forms of contract or agreement of all rules and regulations relating to rates, charges or service to use or to be used and all general privileges and facilities granted or allowed by such gas corporation. * * * But this subdivision shall not apply to state, municipal or federal contracts. Unless the Commission otherwise orders, no change shall be made in any rate or charge or in any form of contract or agreement or any rule or regulation relating to any rate, charge or service or in any general privilege or facility which shall have been filed and published by a gas corporation, except after thirty days' notice to the Commission and publication for thirty days as required by order of the Commission, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the change will go into effect. The Commission for good cause shown may allow changes without requiring the thirty days' notice under such conditions as it may prescribe. No corporation shall charge, demand, collect or receive a greater or less or different compensation for any service rendered or to be rendered than the rates and charges applicable to such service as specified in its schedule filed and in effect at the time; nor shall any corporation refund or remit in any manner or by any device any portion of its rates or charges so specified nor to extend to any person or corporation any form of contract or agreement or any rule or regulation or any privilege or facility except such as are regularly and uniformly extended to all persons and corporations under like circumstances. * * *

"13. *In case any * * * gas corporation engaged in carrying on any other business than owning, operating or managing a gas plant, which other business is not otherwise subject to the jurisdiction of the Commission and is so conducted that its operations are to be substantially*

kept separate and apart from the owning, operating, managing or controlling of such gas plant, said corporation with respect to such other business, shall not be subject to any of the provisions of this chapter and shall not be required to procure the consent or authorization of the Commission to any act in such other business or to make any report in respect thereof, but this subdivision shall not restrict or limit the powers of the Commission in respect to the owning, managing, operating and controlling by such gas corporation of such gas plant. * * * and said powers shall include also the right as to and prescribe the apportionment of capitalization, earnings, debts and expenses fairly and justly to be awarded to or borne by the ownership, operation, management or control of such gas plant as distinguished from such other business. In any such case, if the owning, operating, managing or controlling of such gas plant is wholly subsidiary to the other business carried on by it and is inconsiderable in amount and not general in its character, the Commission may by general rules exempt such corporation from full reports and from the keeping ing of accounts as to such subsidiary business."

Section 10479:

"Whenever there shall be filed with the Commission by any gas corporation * * * a new rate or charge, or any new form of contract, or agreement, or any new rule, regulation or practice relating to any rate, charge or service or to any general privilege, or facility, the Commission shall have and it is hereby given authority either upon complaint or upon its own initiative without complaint, at once and if it so orders without answer or other formal pleading by the interested gas corporation * * * but upon reasonable notice to enter upon the hearing concerning the propriety

of such rate, charge, form of contract or agreement, rule, regulation or practice, and pending such hearing and the decision thereon, the Commission upon filing such schedule and delivering to the gas corporation * * * a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, form of contract or agreement, rule, regulation or practice, but not for a longer period than one hundred twenty days beyond the time when such rate, charge, form of contract or agreement, rule, regulation or practice would otherwise go into effect, and after full hearing, whether completed before or after the rate, charge, form of contract or agreement, rule, regulation or practice goes into effect, the Commission may make such order in reference to such rate, charge, form of contract, or agreement, rule, regulation or practice as would be proper in a proceeding initiated after the rate, charge, form of contract or agreement, rule, regulation or practice had become effective, provided that if any such hearing cannot be concluded within the period of suspension, the Commission may in its discretion suspend the time for a further period, not exceeding six months. At any hearing involving a rate, sought to be increased after the passage of this article, the burden of proof to show that the increased rate or proposed increased rate is just shall be upon the gas corporation, and the Commission shall give to the hearing a decision of such questions preference over all other questions pending before it and decide the same as speedily as possible."